



# California Regulatory Notice Register

REGISTER 2008, NO. 16-Z

PUBLISHED WEEKLY BY THE OFFICE OF ADMINISTRATIVE LAW

APRIL 18, 2008

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The *California Regulatory Notice Register* is an official state publication of the Office of Administrative Law containing notices of proposed regulatory actions by state regulatory agencies to adopt, amend or repeal regulations contained in the California Code of Regulations. The effective period of a notice of proposed regulatory action by a state agency in the *California Regulatory Notice Register* shall not exceed one year [Government Code § 11346.4(b)]. It is suggested, therefore, that issues of the *California Regulatory Notice Register* be retained for a minimum of 18 months.

CALIFORNIA REGULATORY NOTICE REGISTER (USPS 002–931), (ISSN 1041-2654) is published weekly by the Office of Administrative Law, 300 Capitol Mall, Suite 1250, Sacramento, CA 95814-4339. The Register is printed by Thomson West and is offered by subscription for \$302.00 (annual price). To order or make changes to current subscriptions, please call (800) 888-3600. “Periodicals Postage Paid in Saint Paul, MN.” **POSTMASTER:** Send address changes to the: CALIFORNIA REGULATORY NOTICE REGISTER, Thomson–West/Barclays, P.O. Box 2006, San Francisco, CA 94126. The Register can also be accessed at <http://www.oal.ca.gov>.

## PROPOSED ACTION ON REGULATIONS

*Information contained in this document is published as received from agencies and is not edited by Thomson West.*

### TITLE 2. FAIR POLITICAL PRACTICES COMMISSION

NOTICE IS HEREBY GIVEN that the Fair Political Practices Commission, pursuant to the authority vested in it by Sections 82011, 87303, and 87304 of the Government Code to review proposed conflict-of-interest codes, will review the proposed/amended conflict-of-interest codes of the following:

#### CONFLICT-OF-INTEREST CODES

##### ADOPTION

MULTI-COUNTY: San Joaquin Valley Power  
Authority

A written comment period has been established commencing on **April 18, 2008** and closing on **June 2, 2008**. Written comments should be directed to the Fair Political Practices Commission, Attention **Ashley Clarke**, 428 J Street, Suite 620, Sacramento, California 95814.

At the end of the 45-day comment period, the proposed conflict-of-interest code(s) will be submitted to the Commission's Executive Director for his review, unless any interested person or his or her duly authorized representative requests, no later than 15 days prior to the close of the written comment period, a public hearing before the full Commission. If a public hearing is requested, the proposed code(s) will be submitted to the Commission for review.

The Executive Director or the Commission will review the above-referenced conflict-of-interest code(s), proposed pursuant to Government Code Section 87300, which designate, pursuant to Government Code Section 87302, employees who must disclose certain investments, interests in real property and income.

The Executive Director or the Commission, upon his or its own motion or at the request of any interested person, will approve, or revise and approve, or return the

proposed code(s) to the agency for revision and re-submission within 60 days without further notice.

Any interested person may present statements, arguments or comments, in writing to the Executive Director of the Commission, relative to review of the proposed conflict-of-interest code(s). Any written comments must be received no later than **June 2, 2008**. If a public hearing is to be held, oral comments may be presented to the Commission at the hearing.

#### COST TO LOCAL AGENCIES

There shall be no reimbursement for any new or increased costs to local government which may result from compliance with these codes because these are not new programs mandated on local agencies by the codes since the requirements described herein were mandated by the Political Reform Act of 1974. Therefore, they are not "costs mandated by the state" as defined in Government Code Section 17514.

#### EFFECT ON HOUSING COSTS AND BUSINESSES

Compliance with the codes has no potential effect on housing costs or on private persons, businesses or small businesses.

#### AUTHORITY

Government Code Sections 82011, 87303 and 87304 provide that the Fair Political Practices Commission as the code reviewing body for the above conflict of interest codes shall approve codes as submitted, revise the proposed code and approve it as revised, or return the proposed code for revision and re-submission.

#### REFERENCE

Government Code Sections 87300 and 87306 provide that agencies shall adopt and promulgate conflict-of-interest codes pursuant to the Political Reform Act and amend their codes when change is necessitated by changed circumstances.

#### CONTACT

Any inquiries concerning the proposed conflict-of-interest code(s) should be made to **Ashley Clarke**, Fair Political Practices Commission, 428 J Street, Suite 620, Sacramento, California 95814, telephone (916) 322-5660.

**AVAILABILITY OF PROPOSED CONFLICT  
OF INTEREST CODES**

Copies of the proposed conflict-of-interest codes may be obtained from the Commission offices or the respective agency. Requests for copies from the Commission should be made to **Ashley Clarke**, Fair Political Practices Commission, 428 J Street, Suite 620, Sacramento, California 95814, telephone (916) 322-5660.

**TITLE 2. FAIR POLITICAL  
PRACTICES COMMISSION**

NOTICE IS HEREBY GIVEN that the Fair Political Practices Commission, pursuant to the authority vested in it by Sections 82011, 87303, and 87304 of the Government Code to review proposed conflict-of-interest codes, will review the proposed/amended conflict-of-interest codes of the following:

**CONFLICT-OF-INTEREST CODES**

**ADOPTION**

**MULTI-COUNTY: Water Employee Services  
Authority**

A written comment period has been established commencing on **April 18, 2008** and closing on **June 2, 2008**. Written comments should be directed to the Fair Political Practices Commission, Attention **Ashley Clarke**, 428 J Street, Suite 620, Sacramento, California 95814.

At the end of the 45-day comment period, the proposed conflict-of-interest code(s) will be submitted to the Commission's Executive Director for his review, unless any interested person or his or her duly authorized representative requests, no later than 15 days prior to the close of the written comment period, a public hearing before the full Commission. If a public hearing is requested, the proposed code(s) will be submitted to the Commission for review.

The Executive Director or the Commission will review the above-referenced conflict-of-interest code(s), proposed pursuant to Government Code Section 87300, which designate, pursuant to Government Code Section 87302, employees who must disclose certain investments, interests in real property and income.

The Executive Director or the Commission, upon his or its own motion or at the request of any interested person, will approve, or revise and approve, or return the

proposed code(s) to the agency for revision and re-submission within 60 days without further notice.

Any interested person may present statements, arguments or comments, in writing to the Executive Director of the Commission, relative to review of the proposed conflict-of-interest code(s). Any written comments must be received no later than **June 2, 2008**. If a public hearing is to be held, oral comments may be presented to the Commission at the hearing.

**COST TO LOCAL AGENCIES**

There shall be no reimbursement for any new or increased costs to local government which may result from compliance with these codes because these are not new programs mandated on local agencies by the codes since the requirements described herein were mandated by the Political Reform Act of 1974. Therefore, they are not "costs mandated by the state" as defined in Government Code Section 17514.

**EFFECT ON HOUSING COSTS  
AND BUSINESSES**

Compliance with the codes has no potential effect on housing costs or on private persons, businesses or small businesses.

**AUTHORITY**

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Copies of the proposed conflict-of-interest codes may be obtained from the Commission offices or the respective agency. Requests for copies from the Commission should be made to **Ashley Clarke**, Fair Political Practices Commission, 428 J Street, Suite 620, Sacramento, California 95814, telephone (916) 322-5660.

## TITLE 3. DEPARTMENT OF FOOD AND AGRICULTURE

**NOTICE IS HEREBY GIVEN** that the Department of Food and Agriculture (hereinafter referred to as "Department") is proposing to take the action described in the Informative Digest. A public hearing is not scheduled for this proposal. A public hearing will be held if any interested person, or his or her duly authorized representative, submits a written request for a public hearing to the Department no later than **15 days prior to the close of the written comment period**. Any person interested may present statements or arguments in writing relevant to the action proposed to the person designated in this Notice as the contact person **beginning April 18, 2008 and ending at 5:00 p.m. on June 2, 2008**. Following the public hearing, if one is requested, or following the written comment period if no public hearing is requested, the Department, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

**Authority and Reference:** Pursuant to the authority vested by sections 407, 24561, 24562, 24681 and 24991 of the Food and Agricultural Code, and to implement, interpret or make specific Food and Agricultural Code sections 19240, 19241, 19242, 19260, 19261, 19262, 19280, 19281, 19282, 19501, 19501.5, 19502, 19503 and Division 12, Part 1 (Chapters 1, 2, and 3), Part 2 (Chapters 1, 2, 3, 4, 5, and 6), and Part 3 (Chapters 1, 2, 3, 4, 5, and 6) of said Code, the Department proposes changes to Subchapter 1 of Chapter 5, Division 2, of Title 3 of the California Code of Regulations, to read as follows:

## INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

### Poultry Meat Inspection:

Existing law, Food and Agricultural Code sections 19240, 19241, 19242, 19260, 19261, 19262, 19280, 19281 and 19282 specify the requirements for pet food slaughterers, pet food processors, and pet food importers. Food and Agricultural Code sections 19501, 19501.5, 19502 and 19503 specify the requirements for the slaughter of poultry. Food and Agricultural Code Division 12, Part 1 (Chapters 1, 2, and 3), Part 2 (Chapters 1, 2, 3, 4, 5, and 6), and Part 3 (Chapters 1, 2, 3, 4, 5, and 6) specify the requirements for poultry meat inspections.

The inspection and licensing of poultry meat establishments are exempt from mandatory inspection by the Food Safety and Inspection Service of the United States Department of Agriculture (USDA), but require inspection in California by the Department.

To implement the above-noted sections of law, the Department has in place existing regulations under Articles 1 through 28 of Subchapter 1, Chapter 5, Division 2 of Title 3 of the California Code of Regulations. The regulations set forth the requirements for the inspection and licensure of poultry plants and the application and licensure of Licensed Poultry Meat Inspectors.

This proposal amends various sections of Articles 1 through 28 of Subchapter 1, Chapter 5, Division 2, of Title 3 of the California Code of Regulations. It codifies existing requirements for application and licensure of poultry meat inspectors, and poultry inspection, slaughter, processing, and importation. The Department also incorporates by reference specified portions of the Code of Federal Regulations (CFR), the California Building Code, and specified forms and documents utilized or developed by the Department. This proposal also includes updated industry and Departmental terminology for consistency and clarity purposes.

## COMPARABLE FEDERAL REGULATIONS

The Department is adopting, or incorporating by reference, specified sections of the following federal rules, requirements, and policies with such changes as specified in this proposal to make them applicable to state operations and transactions for meat and poultry inspection pursuant to sections 19502, 24561 and 24462 of the Food and Agricultural Code:

- 9 CFR sections 307.1 and 307.2 (2007).
- 9 CFR section 381.73 (2007).
- 9 CFR Part 416 (2007).
- 40 CFR Part 141 sections 141.1, 141.2, 141.3, 141.4, 141.5, 141.6, 141.11, 141.13, 141.21, 141.22 and 141.23 (2007).



- 2007 California Building Code, Title 24, Part 2, Volume 1, Sections 1240, 1241, 1242 and 1243.
- 9 CFR sections 381.11, 381.12, and 381.13 (2007); USDA FSIS Directive 6030.1, Revision 1, August 10, 2005.

## FISCAL IMPACT STATEMENTS

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None

Nondiscretionary Costs/Savings to Local Agencies: None

Local Mandate: None

Cost to Any Local Agency or School District for Which Government Code Section 17561 Requires Reimbursement: None

Business Impact: The Department has made an initial determination that this proposed regulatory action will not have a significant statewide adverse economic impact directly affecting California businesses, including the ability of California businesses to compete with businesses in other states. This proposal pertains to custom livestock slaughterhouses, pet food slaughterers, and poultry plants that are exempt from federal inspection. It also pertains to licensed Poultry Meat Inspectors performing poultry meat inspection activities. The cost impacts that a business would necessarily incur in reasonable compliance with the proposed action are paperwork, reporting, and recordkeeping requirements as follows:

- A detailed list of each form, document, guideline and manual is included in the rulemaking file and is available to the public upon request.

*Paperwork:* Completion of application forms for a person to apply for a license to become a Poultry Meat Inspector or for a person or business to apply for a license to operate a poultry plant. Completion of applications for label formulation and approval, and approval to import poultry into California. The costs associated with the application process are set forth in Food and Agricultural Code sections 19225, 19227, 24744, 25053 and 25055. The Department at no cost provides the application forms.

*Reporting:* Completion of inspection reports, facility notes, daily and monthly reports of animals slaughtered at each facility, and a schedule of operations. The costs associated with reporting cannot be determined as it is a standard business practice for persons slaughtering or processing

poultry. The Department provides the reporting forms at no cost and the forms are normally completed on site at the facility.

*Recordkeeping:* Completion of sanitation standard operating procedures, poultry plant plan guidelines, poultry plant construction and equipment guidelines, and training manuals. The costs associated with recordkeeping cannot be determined by the Department as it varies based upon the size of the facility and the number of poultry slaughtered and processed. However, recordkeeping is a standard business practice for individuals engaged in the business of processing poultry and poultry meat food products to ensure the safety and wholesomeness of the product.

In making these determinations, the Department has not considered alternatives that would lessen any adverse economic impact on businesses and invites the public to submit such proposals during the written comment period. Submissions may include the following considerations:

- The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.
- The consolidation or simplification of compliance and reporting requirements for businesses.
- The use of performance standards rather than prescriptive standards.
- Exemption or partial exemption from the regulatory requirements for businesses.

Impact on Jobs/New Businesses: The Department has determined that this regulatory proposal will not have any impact on the creation of jobs or businesses or the elimination of jobs or existing businesses or the expansion of businesses in California.

Cost Impacts on Private Persons or Entities: The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. This proposal pertains to custom livestock slaughterhouses, pet food slaughterers, and poultry plants that are exempt from federal inspection. It also pertains to licensed Poultry Meat Inspectors performing poultry meat inspection activities. The cost impacts that a private person or entity would necessarily incur in reasonable compliance with the proposed action are paperwork, reporting, and recordkeeping requirements as follows:

- A detailed list of each form, document, guideline and manual is included in the rulemaking file and is available to the public upon request.

*Paperwork:* Completion of application forms for a person to apply for a license to become a Poultry Meat Inspector or for a person or business to apply for a license to operate a poultry plant. Completion of applications for label formulation and approval, and approval to import poultry into California. The costs associated with the application process are set forth in Food and Agricultural Code sections 19225, 19227, 24744, 25053 and 25055. The Department at no cost provides the application forms.

*Reporting:* Completion of inspection reports, facility notes, daily and monthly reports of animals slaughtered at each facility, and a schedule of operations. The costs associated with reporting cannot be determined as it is a standard business practice for persons slaughtering or processing poultry. The Department provides the reporting forms at no cost and the forms are normally completed on site at the facility.

*Recordkeeping:* Completion of sanitation standard operating procedures, poultry plant plan guidelines, poultry plant construction and equipment guidelines, and training manuals. The costs associated with recordkeeping cannot be determined by the Department as it varies based upon the size of the facility and the number of poultry slaughtered and processed. However, recordkeeping is a standard business practice for individuals engaged in the business of processing poultry and poultry meat food products to ensure the safety and wholesomeness of the product.

Effect on Housing Costs: None

Finding of Necessity for Report: The Department finds that it is necessary for the health, safety, and general welfare of the people of the state that this regulation requiring a report apply to businesses.

#### EFFECT ON SMALL BUSINESS

The Department has determined that the proposed regulations would affect small businesses.

#### CONSIDERATION OF ALTERNATIVES

The Department must determine that no reasonable alternative which it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action described in this Notice.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above-mentioned hearing (if a hearing is requested from the public), or during the public comment period.

#### INITIAL STATEMENT OF REASONS

The Department has prepared an initial statement of reasons for the proposed action and has available all the information upon which the proposal is based.

#### TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing (if a hearing is requested) or during the public comment period upon request from the Department of Food and Agriculture, 1220 N Street, Room A-116, Sacramento, California 95814.

#### AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file, which is available for public inspection by contacting the persons named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact persons named below.

#### CONTACT PERSONS

Inquiries concerning the substance of the proposed regulations are to be addressed to the following:

Name:	Alfred Aquino, DVM
Address:	Department of Food and Agriculture Meat and Poultry Inspection Branch 1220 N Street, Room A-125 Sacramento, CA 95814
Telephone No.:	(916) 654-0504
Fax No.:	(916) 654-2608
E-mail address:	<a href="mailto:AAquino@cdfa.ca.gov">AAquino@cdfa.ca.gov</a>

Written comments regarding this proposal for inclusion in the Department's official rulemaking file are to be addressed to the following:

Name: Nancy Grillo, Associate Analyst  
Regulation & Legislation  
Coordinator  
Address: Department of Food and  
Agriculture  
Animal Health and Food Safety  
Services  
1220 N Street, Room A-116  
Sacramento, CA 95814  
Telephone No.: (916) 651-7280  
Fax No.: (916) 653-4249  
E-mail address: [NGrillo@cdfa.ca.gov](mailto:NGrillo@cdfa.ca.gov)

Website Access:

Materials regarding this proposal can be found at:  
[www.cdfa.ca.gov/Regulations.html](http://www.cdfa.ca.gov/Regulations.html).

### TITLE 3. DEPARTMENT OF FOOD AND AGRICULTURE

**NOTICE IS HEREBY GIVEN** that the Department of Food and Agriculture (hereinafter referred to as “Department”) is proposing to take the action described in the Informative Digest. A public hearing is not scheduled for this proposal. A public hearing will be held if any interested person, or his or her duly authorized representative, submits a written request for a public hearing to the Department no later than **15 days prior to the close of the written comment period**. Any person interested may present statements or arguments in writing relevant to the action proposed to the person designated in this Notice as the contact person **beginning April 18, 2008 and ending at 5:00 p.m. on June 2, 2008**. Following the public hearing, if one is requested, or following the written comment period if no public hearing is requested, the Department, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by sections 407, 18693, 18726, 18735, 18960, 18961 and 19014 of the Food and Agricultural Code, and to implement, interpret or make specific sections 18725, 18754, 18948, 18951, 18952, 18971 and 19017, Food and Agricultural Code, and 9 CFR section 416.12

(2006), the Department is considering amending section 902.9 of Article 13, Subchapter 1, Chapter 4, Division 2, of Title 3 of the California Code of Regulations, as follows:

#### INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

##### Meat and Poultry Inspection:

Sanitation Standard Operating Procedures (Sanitation SOP's)

Existing law, Food and Agricultural Code Chapter 4 (commencing with section 18650), Chapter 4.1 (commencing with section 18940), Chapter 5 (commencing with section 19200), Chapter 6 (commencing with section 19501) of Part 3, Division 9, and Chapter 2 (commencing with section 24651) and Chapter 3 (commencing with section 24951) of Part 1, Division 12, authorize the Department of Food and Agriculture's (Department) Meat and Poultry Inspection Branch to license and inspect custom livestock slaughterhouses, pet food slaughterers, and meat processing establishments, that are exempt from federal inspection.

To implement the above-referenced statutes, the Department has in place existing regulations under Articles 1-14 of Subchapter 1, Chapter 4, Division 2 of Title 3 of the California Code of Regulations. The regulations specify the requirements for inspecting meat and poultry in California, the examination and licensure requirements for Livestock Meat Inspectors and Processing Inspectors, and the requirements for persons operating a slaughter and/or meat processing establishment. The regulations also include references to the Code of Federal Regulations (CFR) relating to meat and poultry inspection.

This proposal amends section 902.9 of Article 3, Subchapter 1, Chapter 4, Division 2 of Title 3 of the California Code of Regulations. The Department proposes to make a grammatical correction in addition to extending the deadline for the development of Sanitation SOP's from January 1, 2009 to January 1, 2010, for official establishments that process meat and poultry products.

#### COMPARABLE FEDERAL REGULATIONS

The Department has adopted, or incorporated by reference, specified sections of the federal rules, requirements, and policies pursuant to sections 18735 and 18961 of the Food and Agricultural Code. This proposal pertains to existing section 902.9 of Title 3 of the California Code of Regulations, which includes a reference to 9 CFR section 416.12 (2006) regarding the development of Sanitation SOP's.



## FISCAL IMPACT STATEMENTS

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None

Nondiscretionary Costs/Savings to Local Agencies: None

Local Mandate: None

Cost to Any Local Agency or School District for Which Government Code Section 17561 Requires Reimbursement: None

Business Impact: The Department has made an initial determination that this proposed regulatory action will not have a significant statewide adverse economic impact directly affecting California businesses, including the ability of California businesses to compete with businesses in other states. The following compliance requirements are projected to result from the proposed action:

*Paperwork:* Existing section 902.9 of Title 3 of the California Code of Regulations requires each official meat and poultry processing establishment to have in place written procedures governing its operations, which are commonly referred to as Sanitation SOP's. This proposal extends the deadline for the development of those written procedures. This proposal does not impose any new costs or paperwork requirements.

Impact on Jobs/New Businesses: The Department has determined that this regulatory proposal will not have any impact on the creation of jobs or businesses or the elimination of jobs or existing businesses or the expansion of businesses in California.

Cost Impacts on Private Persons or Entities: The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. The following compliance requirements are projected to result from the proposed action:

*Paperwork:* Existing section 902.9 of Title 3 of the California Code of Regulations requires each official meat and poultry processing establishment to have in place written procedures governing its operations, which are commonly referred to as Sanitation SOP's. This proposal extends the deadline for the development of those written procedures. This proposal does not impose any new costs or paperwork requirements.

Effect on Housing Costs: None

## EFFECT ON SMALL BUSINESS

The Department has determined that the proposed regulations would affect small businesses.

## CONSIDERATION OF ALTERNATIVES

The Department must determine that no reasonable alternative which it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action described in this Notice.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above-mentioned hearing (if a hearing is requested from the public), or during the public comment period.

## INITIAL STATEMENT OF REASONS

The Department has prepared an initial statement of reasons for the proposed action and has available all the information upon which the proposal is based.

## TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing (if a hearing is requested) or during the public comment period upon request from the Department of Food and Agriculture, 1220 N Street, Room A-116, Sacramento, California 95814.

## AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file, which is available for public inspection by contacting the persons named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact persons named below.

**CONTACT PERSONS**

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Name: Alfred Aquino, DVM  
Address: Department of Food and  
Agriculture  
Meat and Poultry  
Inspection Branch  
1220 N Street, Room A-125  
Sacramento, CA 95814  
Telephone No.: (916) 654-0504  
Fax No.: (916) 654-2608  
E-mail address: [AAquino@cdfa.ca.gov](mailto:AAquino@cdfa.ca.gov)

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Regulation & Legislation  
Coordinator  
Address: Department of Food and  
Agriculture  
Animal Health and Food  
Safety Services  
1220 N Street, Room A-116  
Sacramento, CA 95814  
Telephone No.: (916) 651-7280  
Fax No.: (916) 653-4249  
E-mail address: [NGrillo@cdfa.ca.gov](mailto:NGrillo@cdfa.ca.gov)

Website Access:

Materials regarding this proposal can be found at:  
[www.cdfa.ca.gov/Regulations.html](http://www.cdfa.ca.gov/Regulations.html).

**TITLE 10. MANAGED RISK MEDICAL  
INSURANCE BOARD**

**NOTICE OF PROPOSED RULEMAKING  
R-2-08**

**TITLE 10. CALIFORNIA CODE OF  
REGULATIONS  
CHAPTER 5.6 ACCESS FOR INFANTS AND  
MOTHERS PROGRAM**

**AMEND SECTIONS 2699.100; 2699.201;  
2699.205; 2699.207; 2699.209; and 2699.400**

**NATURE OF PROCEEDING**

NOTICE IS HEREBY GIVEN that the Managed Risk Medical Insurance Board (MRMIB) is proposing to take the action described in the Informative Digest.

A public hearing regarding this proposal will be held on June 3, 2008 at 9:00 a.m. at 1000 G Street, Suite 450, Sacramento, CA 95814.

Following the public hearing MRMIB may thereafter adopt the proposal substantially as described below or may modify the proposals if the modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written comments related to this proposal, or who provide oral testimony at the public hearing, or who have requested notification of any changes to the proposal.

Notice is also given that any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the

Managed Risk Medical Insurance Board  
Attn: JoAnne French  
1000 G Street, Suite 450  
Sacramento, CA 95814

Comments may also be submitted by facsimile (FAX) at (916) 327-6580 or by e-mail to [jfrench@mrrib.ca.gov](mailto:jfrench@mrrib.ca.gov). Comments must be submitted prior to 5:00 p.m. on June 3, 2008.

**AUTHORITY AND REFERENCE**

Pursuant to the authority vested by Section 12696.05 Insurance Code, and Reference Sections: 12693.765; 12695; 12695.06; 12695.08; 12695.18; 12695.20; 12695.22; 12695.24; 12696; 12696.05; 12698; 12698.05; 12698.30; Insurance Code. Amendment of Sections 2699.201; 2699.205; 2699.207; 2699.209; and 2699.400.

**INFORMATIVE DIGEST/POLICY STATEMENT  
OVERVIEW**

Insurance Code Sections 12695, et seq. established the Access for Infants and Mothers (AIM) Program in 1991, to provide health insurance to low and moderate income pregnant women and the infants born to the covered women. The program, established under the Managed Risk Medical Insurance Board (MRMIB), is funded from four sources: the Cigarette and Tobacco Products Surtax Fund (Prop. 99), State General Fund, Federal Funds from Title XXI of the Social Security Act, and subscriber contributions. AIM is a means tested program, covering pregnant women with family incomes above 200%, but not more than 300%, of the federal poverty level (FPL). Women with family in-

comes below 200% FPL qualify for no cost Medi-Cal services for their pregnancy, funded by State and Federal dollars.

Currently, the AIM program requires the subscriber to pay the full contribution rate of 1.5% during the term of their pregnancy, regardless of when the subscriber is no longer pregnant, after their effective date of coverage. The proposed regulation changes state that subscribers enrolled on or after July 1, 2008, who are no longer pregnant by the end of their first trimester, will not be subjected to pay the entire 1.5% contribution. Instead, their subscriber contribution will be reduced to one-third (1/3) of the current 1.5% subscriber contribution. The proposed regulations provide a definition for first trimester.

There are no comparable provisions of federal law related to this proposal.

#### LOCAL MANDATE

This proposal does not impose a mandate on local agencies or school districts.

#### FISCAL IMPACT ESTIMATES

This proposal does not impose a mandate on local agencies or school districts for which reimbursement would be required pursuant to Part 7 (commencing with Section 17500 of Division 4 of the Government Code. This proposal does not impose other nondiscretionary cost or savings on local agencies. This proposal does not result in any cost or savings in federal funding to the state.

#### COSTS OR SAVINGS TO STATE AGENCIES

There will be a minimal increase in costs to the state due to the fact that we will charge subscribers less if they have a miscarriage in the first trimester. However, there are very few miscarriages in the first trimester. MRMIB believes that this is a good public policy modification.

#### BUSINESS IMPACT/SMALL BUSINESS

MRMIB has made an initial determination that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The proposal does not affect small businesses as defined by section

11342.610. The determination that the proposal would not affect small business is based upon the fact that the proposal applies only to the procedures followed by MRMIB should a determination of insufficient funding be made by the Board. It has no impact at all on any entity that is not a state agency as defined in section 11000 of the California Government Code as the regulations only establish procedures.

#### ASSESSMENT REGARDING EFFECT ON JOBS/BUSINESSES

The MRMIB has determined that this regulatory proposal will not have any impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California.

#### COST IMPACTS ON REPRESENTATIVE PERSON OR BUSINESS

The MRMIB is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

#### EFFECT ON HOUSING COSTS

None

#### ALTERNATIVES

The MRMIB must determine that no reasonable alternative considered by the agency, or that has been otherwise identified and brought to the agency's attention, would be more effective in carrying out the purpose for which the adoption of this regulation is proposed, or would be as effective as and less burdensome to affected private persons than the proposed action.

#### CONTACT PERSONS

Inquiries concerning the proposed adoption of this regulation and written comments may be directed to:

JoAnne French  
Managed Risk Medical Insurance Board  
1000 G Street, Suite 450  
Sacramento, CA 95814  
(916) 327-7978  
or

Randi Turner  
Managed Risk Medical Insurance Board  
1000 G Street, Suite 450  
Sacramento, CA 95814  
(916) 327-8243

## INITIAL STATEMENT OF REASONS

The MRMIB has prepared an initial statement of reasons for the proposed action and has available all the information upon which the proposal is based.

## TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the initial statement of reasons, and all of the information upon which this proposal is based, may be obtained upon request from the Managed Risk Medical Insurance Board at 1000 G Street, Suite 450, Sacramento, CA 95814. These documents may also be viewed and downloaded from the MRMIB website at [www.mrmib.ca.gov](http://www.mrmib.ca.gov).

## AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations are based is contained in the rulemaking file which is available for public inspection by contacting the person named above.

You may obtain a copy of the final statement of reasons once it has been prepared by making a written request to the contact person named above.

## WEBSITE ACCESS

Materials regarding this proposal can be found at [www.mrmib.ca.gov](http://www.mrmib.ca.gov).

## TITLE 13. DEPARTMENT OF MOTOR VEHICLES

### NOTICE IS HEREBY GIVEN

The Department of Motor Vehicles (the department) proposes to amend section 20.04 and adopt section 20.05 in Chapter 1, Division 1, Article 2 of Title 13, California Code of Regulations relating to driver licenses and identification cards.

### PUBLIC HEARING

A public hearing regarding this proposed regulatory action is not scheduled. However, a public hearing will be held if any interested person or his or her duly authorized representative requests a public hearing to be held relevant to the proposed action by submitting a written

request to the contact person identified in this notice no later than 5:00 P.M., fifteen (15) days prior to the close of the written comment period.

## DEADLINE FOR WRITTEN COMMENTS

Any interested person or his or her duly authorized representative may submit written comments relevant to the proposed regulations to the contact person identified in this notice. All written comments must be received at the department no later than 5:00 P.M., **June 2, 2008**, the final day of the written comment period, in order for them to be considered by the department before it adopts the proposed regulation.

## AUTHORITY AND REFERENCE

The department proposes to adopt this regulation under the authority granted by Section 1651 of the Vehicle Code in order to implement, interpret or make specific Sections 12800, 12800.7, 12809, 12811, 13000, and 13005 of the Vehicle Code.

## INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Department of Motor Vehicles (department) proposes to amend section 20.04 and adopt section 20.05, Title 13 of the California Code of Regulations, relating to Driver Licenses and Identification Cards. Vehicle Code section 12800 requires every driver license application to contain the applicant's true full name. Vehicle Code section 12800.7 authorizes the department to require a person applying for a driver license to produce identification to ensure the name on the application is the applicant's true full name. Vehicle Code section 12809 allows the department to refuse issuance of a driver license under specified circumstances. Vehicle Code section 12811 sets standards for issuance and contents of a driver license card and Vehicle Code sections 13000 and 13005 authorize the issuance and content of identification cards.

Because government agencies, as well as commercial entities, rely on department issued driver licenses and identification cards as evidence of a person's identity, the department is responsible for ensuring that information collected from a card applicant is accurate. This information includes true full name, birthdate, gender, social security number and address information.

The department is proposing to amend a current regulation relating to the process by which an applicant may change the name on his or her driver license or identification card, and adopt a new regulation relating to the process by which an applicant may change the gender identified on his or her driver license or identification



card due to a transitional or completed gender change. These regulatory changes will enhance the integrity and authenticity of information contained on department issued driver licenses and identification cards. The accuracy of information reported to the department must be consistent with identity information provided to other government agencies to avoid multiple, legally recognized identities.

The department will no longer accept a Medical Information Authorization (Gender Change), form DL 328 (Rev. 11/07) to execute a name change. Individuals wishing to change both their name and gender will be required to comply with the procedures set forth in sections 20.04 and 20.05 of this article.

#### DOCUMENTS INCORPORATED BY REFERENCE

The following form is incorporated by reference in section 20.05. This form is not published in the California Code of Regulations because it would be impractical and cumbersome to publish this document in the California Code of Regulations.

- Medical Information Authorization (Gender Change), form DL 328 (Rev. 11/07)

This form was made available during the public comment period and is on the department's internet website, in any field office, or by calling the department's toll free telephone number at (800) 777-0133. This document was made available upon request directly from the department and is reasonably available to the affected public from a commonly known or specified source.

#### FISCAL IMPACT STATEMENT

- Cost or Savings To Any State Agency: None.
- Other Non-Discretionary Cost or Savings to Local Agencies: None.
- Costs or Savings in Federal Funding to the State: None.
- Cost Impact on Representative Private Persons or Businesses: A representative individual could be required to pay up to four hundred dollars (\$400) in costs for a court-approved name change.
- Effect on Housing Costs: None.

#### DETERMINATIONS

The department has made the following initial determinations concerning the proposed regulatory action:

- The proposed regulatory action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This is a voluntary process individuals may utilize to change the gender identified on the driver license or identification card.
- The adoption of this regulation is not expected to create or eliminate jobs or businesses in the state of California or reduce or expand businesses currently doing business in the state of California.
- The proposed regulatory action will not impose a mandate on local agencies or school districts, or a mandate that requires reimbursement pursuant to part 7 (commencing with Section 17500) of Division 4 of the Government Code.
- The proposed regulatory action will not affect small businesses. This is a voluntary process individuals may utilize to change the gender identified on their driver license or identification card.

#### PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS

A pre-notice workshop, pursuant to Government Code section 11346.45, is not required because the issues addressed in the proposal are not so complex or large in number that they cannot easily be reviewed during the comment period.

#### ALTERNATIVES CONSIDERED

The department must determine that no reasonable alternative considered by the department or that has otherwise been identified and brought to the attention of the department would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action.

#### CONTACT PERSON

Inquiries relevant to the proposed action and questions on the substance of the proposed regulations should be directed to the department representative, Randi Calkins, Department of Motor Vehicles, P.O. Box 932382, Mail Station E-244, Sacramento, California, 94232-3820; telephone number (916) 657-8898, or [rcalkins@dmv.ca.gov](mailto:rcalkins@dmv.ca.gov). In the absence of the department representative, inquiries may be directed to Erik Meyer at (916) 657-8954 or [emeyer@dmv.ca.gov](mailto:emeyer@dmv.ca.gov). The

fax number for the Regulations Branch is (916) 657-1204.

#### **AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS**

The department has prepared an initial statement of reasons for the proposed action, and has available all the information upon which the proposal is based. The contact person identified in this notice shall make available to the public upon request the express terms of the proposed action using underline or italics to indicate additions to, and strikeouts to indicate deletions from the California Code of Regulations. The contact person identified in this notice shall also make available to the public, upon request, the final statement of reasons once it has been prepared and submitted to the Office of Administrative Law, and the location of public records, including reports, documentation and other materials related to the proposed action. In addition, the above-cited materials (Initial Statement of Reasons and Express Terms) may be accessed at the Regulatory Actions webpage at [www.dmv.ca.gov/about/lad/regactions.htm](http://www.dmv.ca.gov/about/lad/regactions.htm).

#### **AVAILABILITY OF MODIFIED TEXT**

Following the written comment period and the hearing, if one is held, the department may adopt the proposed regulations substantially as described in this notice. If modifications are made which are sufficiently related to the originally proposed text, the full, modified text with changes clearly indicated would be made available to the public for at least 15 days prior to the date on which the department adopts the resulting regulations. Requests for copies of any modified regulations should be addressed to the department contact person identified in this notice. The department will accept written comments on the modified regulations for 15 days after the date on which they are first made available to the public.

### **TITLE 13. DEPARTMENT OF MOTOR VEHICLES**

#### **NOTICE IS HEREBY GIVEN**

The Department of Motor Vehicles (the department) proposes to amend Sections 15.00 and 15.03 in Chapter 1, Division 1, Article 2 of Title 13, California Code of Regulations, relating to driver licenses and identification cards.

#### **PUBLIC HEARING**

A public hearing regarding this proposed regulatory action is not scheduled. However, a public hearing will be held if any interested person or his or her duly authorized representative requests a public hearing to be held relevant to the proposed action by submitting a written request to the contact person identified in this notice no later than 5:00 p.m., fifteen (15) days prior to the close of the written comment period.

#### **DEADLINE FOR WRITTEN COMMENTS**

Any interested person or his or her duly authorized representative may submit written comments relevant to the proposed regulations to the contact person identified in this notice. All written comments must be received at the department no later than ***June 2, 2008***, the final day of the written comment period, in order for them to be considered by the department before it adopts the proposed regulations.

#### **AUTHORITY AND REFERENCE**

The department proposes to adopt the proposed actions under the authority granted by Vehicle Code sections 1651 and 12801.5, in order to implement, interpret or make specific Vehicle Code sections 12506, 12800, 12805, 12816, 13000, 13002 and 14100.

#### **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

The Department of Motor Vehicles (the department) proposes to amend sections 15.00 and 15.03 of Article 2, California Code of Regulations, relating to driver licenses and identification cards.

These amendments will cite federal regulations when defining "lawful permanent residency" as it applies to immigrants who are required to provide the department with proof of legal presence when applying for a driver license or identification card. The Code of Federal Regulations, Title 8, part 1, section 1.1(p) states the following:

"The term lawfully admitted for permanent residence means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws."

By identifying the federal regulation, the department is incorporating the language and standards used by the authorizing federal agency to ensure conformity of state to federal usage of utilized terms. These amendments will also update references to federal and state entities that have been reorganized and renamed.

## FISCAL IMPACT STATEMENT

- Cost Or Savings To Any State Agency: None.
- Other Non-Discretionary Cost or Savings to Local Agencies: None.
- Costs or Savings in Federal Funding to the State: None.
- Cost Impact on Representative Private Persons or Businesses: The department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
- Effect on Housing Costs: None.

## DETERMINATIONS

The department has made the following initial determinations concerning the proposed regulatory action:

- The proposed regulatory action will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. No studies or data were relied upon in support of this proposal.
- The adoption of this regulation will neither create nor eliminate jobs or businesses in the state of California, will not result in the elimination of existing businesses, and will neither reduce nor expand businesses currently doing business in the state of California.
- The proposed regulatory action will not impose a mandate on local agencies or school districts, or a mandate which requires reimbursement pursuant to part 7 (commencing with Section 17500) of Division 4 of the Government Code.
- The proposed regulatory action will not affect small businesses because the regulations only relate to legal presence documents used in determining eligibility for a driver license or identification card.

## PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS

A pre-notice workshop, pursuant to Government Code section 11346.45, is not required because the issues addressed in the proposal are not so complex or large in number that they cannot easily be reviewed during the comment period.

## ALTERNATIVES CONSIDERED

The department must determine that no reasonable alternative considered by the department or that has otherwise been identified and brought to the attention of the department would be more effective in carrying out the purpose for which the action is proposed, or would be as effective and less burdensome to affected private persons than the proposed action.

## CONTACT PERSON

Inquiries relevant to the proposed action and questions on the substance of the proposed regulations should be directed to the department representative, Randi Calkins, Department of Motor Vehicles, P.O. Box 932382, Mail Station E-244, Sacramento, California 94232-3820; telephone number (916) 657-8898, or [rcalkins@dmv.ca.gov](mailto:rcalkins@dmv.ca.gov). In the absence of the department representative, inquiries may be directed to Christie Patrick at (916) 657-5567 or [cpatrick@dmv.ca.gov](mailto:cpatrick@dmv.ca.gov). The fax number for the Regulations Branch is (916) 657-1204.

## AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The department has prepared an initial statement of reasons for the proposed action, and has available all the information upon which the proposal is based. The contact person identified in this notice shall make available to the public upon request the express terms of the proposed action using underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations. The contact person identified in this notice shall also make available to the public upon request the initial statement of reasons and final statement of reasons, and the location of public records, including reports, documentation and other materials related to the proposed action. In addition, the above-cited materials (Initial Statement of Reasons and Express Terms) may be accessed on the department's regulatory actions webpage at [www.dmv.ca.gov/about/lad/regactions.htm](http://www.dmv.ca.gov/about/lad/regactions.htm).

## AVAILABILITY OF MODIFIED TEXT

Following the written comment period, and the hearing if one is held, the department may adopt the proposed regulations substantially as described in this notice. If modifications are made which are sufficiently related to the originally proposed text, the full modified text with changes clearly indicated shall be made available to the public for at least 15 days prior to the date on which the department adopts the resulting regulations.

Request for copies of any modified regulations should be addressed to the department contact person identified in this notice. The department will accept written comments on the modified regulations for 15 days after the date on which they are first made available to the public.

## TITLE 16. BOARD OF PODIATRIC MEDICINE

NOTICE IS HEREBY GIVEN that the Board of Podiatric Medicine (hereinafter "Board") is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held at the Department of Consumer Affairs hearing room, located at 2005 Evergreen Street, suite 1150, Sacramento, California, 95815-3831, at 9:00 a.m., on June 6, 2008. Written comments must be received by the Board at its office not later than 5:00 p.m. on June 2, 2008, or must be received by the Board at the hearing. The Board, upon its own motion or at the instance of any interested party, may thereafter adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by Sections 2470 of the Business and Professions Code and Section 11400.20 of the Government Code, and to implement, interpret or make specific Sections 11400.20 and 11425.50(e) of the Government Code, the board is considering changes to Division 13.9 of Title 16 of the California Code of Regulations as follows:

### INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

#### Amend Section 1399.710 Disciplinary Guidelines.

Business and Professions Code Sections 2470 authorizes the board to adopt, amend, or repeal, in accordance with the provisions of the Administrative Procedure Act, regulations necessary to enable the board to carry into effect the provisions of law relating to the practice of podiatric medicine.

The Board adopted the disciplinary guidelines as an administrative regulation, which became effective Oc-

tober 1997. The regulation incorporated by reference the disciplinary guidelines entitled "A Manual of Disciplinary Guidelines with Model Disciplinary Orders," in order to improve the efficiency with which enforcement situations were managed. Subsequent revisions to the guidelines adopted by the Board were later incorporated by reference. The *Manual of Disciplinary Guidelines with Model Disciplinary Orders* was last revised September 2005.

On October 19, 2007, the Board approved to amend the *Manual of Disciplinary Guidelines with Model Disciplinary Orders*, specifically standard option 41, *Notice to Employees*.

### FISCAL IMPACT ESTIMATES

#### Fiscal Impact on Public Agencies including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

#### Nondiscretionary Costs/Savings to Local Agencies:

None.

#### Local Mandate:

None.

#### Cost to Any Local Agency or School District for Which Government Code Section 17561 Requires Reimbursement:

None.

#### Business Impact:

The Board has made an initial determination that the proposed regulatory action would have not significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

#### Impact on Jobs/New Businesses:

The Board of Podiatric Medicine has determined that this regulatory proposal will not have any impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California.

#### Cost Impact on Representative Private Persons or Business:

The Board of Podiatric Medicine is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

#### Effect on Housing Costs:

None.

### EFFECT ON SMALL BUSINESS

The Board of Podiatric Medicine has determined that the proposed regulations would not affect small businesses because it relates to enforcement activities against licensees who have violated the law.



## CONSIDERATION OF ALTERNATIVES

The Board of Podiatric Medicine must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would either be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposal described in this Notice.

Any interested person may present statements or arguments orally or in writing relevant to the above determinations at the above-mentioned hearing.

## INITIAL STATEMENT OF REASONS AND INFORMATION

The Board of Podiatric Medicine has prepared an initial statement of the reasons for the proposed action and has available all the information upon which the proposal is based.

## TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations and of the statement of reasons and other information, if any, may be obtained at the hearing or prior to the hearing upon request from the Board of Podiatric Medicine at 2005 Evergreen Street, Suite 1300, Sacramento, California 95815-3831.

## AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulation is based is contained in the rulemaking file which is available for public inspection by contacting the person named below.

You may obtain a copy of the final statement of reasons once it has been prepared, by making a written request to the contact person named below [or by accessing the website listed below].

## CONTACT PERSON

Inquiries or comments concerning the proposed rule-making action may be addressed to:

Name: Kathleen Cook  
Address: 2005 Evergreen Street, Suite 1300  
Sacramento, CA 95815-3831  
Telephone No.: 916-263-0315  
Fax No.: 916-263-2651  
E-Mail Address: Kathleen\_Cook@dca.ca.gov

The backup contact person is:

Name: Jim Rathlesberger  
Address: 2005 Evergreen Street, Suite 1300  
Sacramento, CA 95815-3831  
Telephone No.: 916-263-2650  
Fax No.: 916-263-2651  
E-Mail Address: Jim\_Rathlesberger@dca.ca.gov

Website Access: Material regarding this proposal can be found at [http://www.bpm.ca.gov/lawsregs/prop\\_regs07.shtml](http://www.bpm.ca.gov/lawsregs/prop_regs07.shtml)

## TITLE 16. COURT REPORTERS BOARD OF CALIFORNIA

### NOTICE OF PROPOSED CHANGES IN THE REGULATIONS

NOTICE IS HEREBY GIVEN that the Court Reporters Board of California (Board) is proposing to take the action described in the Informative Digest. Any person interested may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held in the 3<sup>rd</sup> Floor Conference Room at 2535 Capitol Oaks Drive, Sacramento, California 95833, at 1:00 p.m. on June 3, 2008. Written comments must be received by the Board at its office (for the Board's address, see Contact Person section) not later than June 3, 2008 at 5:00 p.m. or at the hearing. The Board, upon its own motion or at the instance of any interested party, may thereafter adopt the proposal substantially as described below or may modify such proposal if such modification is sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in the Notice as the contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

### Authority and Reference Citations

Pursuant to the authority vested by Sections 8007 and 8008 of the Business and Professions (B&P) Code, and to implement, interpret, or make specific Sections

163.5 and 8031 of said Code, the Court Reporters Board of California is considering changes to Division 24 of Title 16 of the California Code of Regulations as follows:

**INFORMATIVE DIGEST/PLAIN ENGLISH  
POLICY STATEMENT OVERVIEW**

**Adopt Section 2450 — Fee Schedule.**

Section 163.5 of the B&P Code sets the renewal delinquency fee at 50% of the renewal fee. Section 8007 authorizes the Board to adopt, amend, or repeal rules and regulations which are reasonably necessary to carry out the provisions of the chapter. Section 8008 authorizes the Board to charge and collect fees. Section 8031 establishes the statutory limits for the fees that the Board may charge and collect.

The existing regulation sets forth the fees that may be charged and collected by the Board for an examination and as a penalty for failure to notify the Board of a name or address change.

This proposal would amend the regulation in order to:

- Delete subsection (a), which sets the fee for an examination at \$75 for each separate part for each administration.
- Add a new subsection (a) to set the fee for filing an application for examination at \$40 for each administration.
- Add a new subsection (b) to set the fee for an initial certificate at \$100 and the fee for an initial certificate that is issued less than 180 days before it will expire at \$50.
- Add a new subsection (c) to set the fee for an annual renewal of a certificate at \$100.
- Add a new subsection (d) to set the delinquency fee for the renewal of a certificate at \$50.
- Add a new subsection (e) to set the fee for a duplicate certificate at \$5.
- Renumber existing subsection (b) to new subsection (f) and amend the text to revise the penalty fee for failure to notify the Board of a change of name or address from \$50 to \$20.

**Adopt Section 2451 — Due Dates of Fees.**

Section 8007 of the B&P Code authorizes the Board to adopt, amend, or repeal rules and regulations which are reasonably necessary to carry out the provisions of the chapter. Section 8008 authorizes the Board to charge and collect fees. Section 8031 establishes the statutory limits for the fees that the Board may charge and collect.

The existing regulation sets forth the due dates of fees that must be paid to the Board, specifically the application fee and the original certificate fee.

This proposal would amend the regulations in order to:

- Revise subsection (b) by changing the term “original certificate” to “initial certificate” to be consistent with the terminology used in Section 2450 and elsewhere.
- Add a new subsection (c) to establish the due date of a delinquency fee for the renewal of a certificate if the certificate is not renewed within thirty (30) days after the date on which it expired.

**Local Mandate**

The proposed regulatory action does not impose a mandate on local agencies or school districts.

**Fiscal Impact on Public Agencies/STD 399**

The proposed regulatory action will not result in costs or savings to any state agency, costs or savings to any local agency or school district that is required to be reimbursed under Part 7 of Division 4 (commencing with Section 17500 of the Government Code), other non-discretionary costs or savings on local agencies, or costs or savings in federal funding to the state.

**Cost Impact on Affected Private Persons**

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. The proposed regulatory action does not represent a fee increase; the proposed fees are the same amounts that are currently charged by the Board.

**Housing Costs**

The proposed regulatory action will not have a significant effect on housing costs.

**Effect on Small Business**

The proposed regulatory action will not affect small businesses, because it only affects individuals who are certified or applying for certification as court reporters. In addition, the proposed fees are the same amounts that are currently charged by the Board.

**Contact Person**

Inquiries or comments concerning the proposed administrative action may be addressed to:

Court Reporters Board of California  
2535 Capitol Oaks Drive, Suite 230  
Sacramento, CA 95833  
Attn: Julia Miranda–Bursell  
(916) 263–3660  
(916) 263–3664 (FAX)  
Julia\_Miranda–Bursell@dca.ca.gov

The backup contact person is:

David Brown  
(916) 263-3660  
(916) 263-3664 (FAX)  
David\_Brown@dca.ca.gov

Inquiries concerning the substance of the proposed regulations may be directed to Julia Miranda-Bursell at (916) 263-3660.

#### **Comment Period**

Written comments must be received by the Board at the Court Reporters Board of California, 2535 Capitol Oaks Drive, Suite 230, Sacramento, CA 95833 not later than June 3, 2008 at 5:00 p.m. or at the hearing to be held in the 3<sup>rd</sup> Floor Conference Room at 2535 Capitol Oaks Drive, Sacramento, CA 95833 at 1:00 p.m. on June 3, 2008.

#### **Availability of Modifications**

With the exception of technical or grammatical changes, the full text of any modified proposal will be available from the person designated in this notice as the contact person for 15 days prior to its adoption and will be mailed to those persons who submit written or oral testimony related to this proposed regulatory action or who have requested notification of any changes to the proposal.

#### **Reference to Text and Initial Statement of Reasons**

The Board has prepared a statement of the reasons for the proposed action, which is available to the public upon request. The express terms of the proposed action and all information upon which the proposal is based are available upon request.

#### **Business Impact**

The Board is not aware of any significant statewide adverse economic impact that the proposed regulatory action will have directly affecting business, including the ability of California businesses to compete with businesses in other states, because it only affects individuals who are certified or applying for certification as court reporters. In addition, the proposed fees are the same amounts that are currently charged by the Board.

#### **Impact on Jobs/New Businesses**

The proposed regulatory action will not affect the creation or elimination of jobs within the State of California, the creation of new businesses or the elimination of existing businesses within the State of California, or the expansion of businesses currently doing business within the State of California, because it only affects individuals who are certified or applying for certification as court reporters. In addition, the proposed fees are the same amounts that are currently charged by the Board.

#### **Public Hearing**

A public hearing will be held in the 3<sup>rd</sup> Floor Conference Room at 2535 Capitol Oaks Drive, Sacramento, CA 95833 at 1:00 p.m. on June 3, 2008.

#### **Federal Mandate**

The proposed regulatory action is not mandated by federal law or is not identical to any previously adopted or amended federal regulation.

#### **Consideration of Alternatives**

The Board must determine that no reasonable alternative which it considered or that has otherwise been identified and brought to its attention would be either more effective in carrying out the purpose for which the action is proposed or would be as effective as and less burdensome on affected private persons than the proposed regulatory action. The actual determination must be part of both the Initial and Final Statement of Reasons.

#### **Availability of the Final Statement of Reasons**

Interested parties may obtain a copy of the Final Statement of Reasons once it has been prepared by making a written request to the contact person named above.

#### **Website Access**

Materials regarding the proposed regulatory action can be found at [www.courtreportersboard.ca.gov](http://www.courtreportersboard.ca.gov).

## **TITLE 22. OFFICE OF STATEWIDE HEALTH PLANNING AND DEVELOPMENT**

### **NOTICE OF INTENT TO PROPOSE REGULATIONS FOR PRESENT ON ADMISSION AND PRINCIPAL LANGUAGE SPOKEN DATA ELEMENTS**

Title 22 California Code of Regulations  
Division 7, Chapter 10 — *Health Facility Data*,  
Amend Article 8, *Patient Data Reporting  
Requirements*,  
to incorporate Present on Admission and Principal  
Language Spoken Data Elements

**NOTICE IS HEREBY GIVEN** that the Office of Statewide Health Planning and Development (OSHPD) proposes to update Sections 97215, 97225, 97226, 97227, 97241, 97244, and 97248, and to add sections 97234 and 97267 to Title 22, Division 7, Chapter 10, Article 8 of the California Code of Regulations (CCR). The proposed effective date is July 1, 2008.

#### **PUBLIC HEARING**

No public hearing is scheduled. Any interested person, or his or her duly authorized representative, may

submit a written request for a public hearing, pursuant to section 11346.8(a) of the Government Code. The written request for hearing must be received by OSHPD's contact person, designated below, no later than 15 days prior to the close of the written comment period.

#### WRITTEN COMMENT PERIOD

Any interested person, or his or her duly authorized representative, may submit written statements, arguments or contentions (hereafter referred to as comments) relevant to the proposed regulatory action by OSHPD. Comments must be received by the Patient Data Section of OSHPD by 5 p.m. on Monday, **June 2, 2008**, which is hereby designated as the close of the written comment period. Please address all comments to OSHPD, Patient Data Section, Attention: Regulations Coordinator. Comments may be transmitted by regular mail, fax, email or via the OSHPD website:

Website: [www.oshpd.ca.gov/HID/MIRCal](http://www.oshpd.ca.gov/HID/MIRCal)

E-mail: [cdiamond@oshpd.ca.gov](mailto:cdiamond@oshpd.ca.gov) or  
[iogbonna@oshpd.ca.gov](mailto:iogbonna@oshpd.ca.gov).

Mail: Candace L. Diamond, Manager  
Patient Data Section  
400 R Street, Suite 270,  
Sacramento, California 95811-6213

Fax: (916) 327-1262

Please note, if comments are sent via the website, email or fax there is no need to send the same comments by mail delivery. Website and email are the preferred methods for receiving comments. All comments whether sent by website, email, fax or by mail should include the author's name, email address and U.S. Postal Service address so that OSHPD may provide commenters with notice or any additional proposed changes to the regulations text.

Inquiries concerning the proposed adoption of these regulations may be directed to [cdiamond@oshpd.ca.gov](mailto:cdiamond@oshpd.ca.gov) or [iogbonna@oshpd.ca.gov](mailto:iogbonna@oshpd.ca.gov)

Candace L. Diamond, Manager  
Patient Data Section  
400 R Street, Suite 270,  
Sacramento, California 95811-6213

Irene Ogbonna, Analyst  
Patient Data Section  
400 R Street, Suite 270,  
Sacramento, California 95811-6213

#### AUTHORITY AND REFERENCE

Authority for the proposed regulations is provided by the California Health and Safety Code, Sections 123147, 128735(f), 128735(g)(5), 128736(a)(5), 128736(d), 128737(a)(5), 128737(d), 128755, and 128810. The reference citations are Sections 128735, 128736, 128737, and 128770.

#### TEXT OVERVIEW AND POLICY STATEMENT

OSHPD is attempting to minimize health facility data reporting burdens by aligning state requirements and definitions with established national standards (as required by California Health and Safety Code Section 128735(f) which requires reporting requirements established by OSHPD to be consistent with national standards as applicable). This regulation package proposes migration from the OSHPD Discharge Data set's proprietary "Whether the Condition was Present at Admission" (CP@A) data element to a similar national standard data element called the "Present on Admission Indicator" (POA). In May of 2007, when the Uniform Billing 1992 form (UB92) used by all facilities who generate electronic bills was superseded by the Uniform Billing 2004 (UB04) form, the "Present on Admission Indicator" (POA) began to be reported by all facilities who use the UB04. OSHPD would like to become consistent with the national standard by adopting the POA Indicator data element in place of the CP@A data element.

This regulation package also proposes that the new data element "Principal Language Spoken" be reported with discharges and encounters occurring on or after January 1, 2008. SB 680, Figueroa, (Statute of 2001), incorporated into the California Health and Safety Code in Sections 128735(g)(5), 128736(a)(5), and 128737(a)(5), required that "Principal Language Spoken" be added as a data element to both inpatient and outpatient OSHPD data collection. More recently AB 800, Yee, (Statute of 2006), incorporated into the California Health and Safety Code in Section 123147, also required that a patient's principal spoken language be included in a patient's health record.

#### INFORMATIVE DIGEST/SUMMARY OF PROPOSED CHANGES

This regulation package proposes that OSHPD Discharge Data set's proprietary "Whether the Condition was Present at Admission" (CP@A) data element should be replaced with a similar national standard data element called the "Present on Admission indicator" (POA). This would allow facilities who report POA to Medicare to report identical data to OSHPD and thus



would reduce their reporting burden. Another benefit is that POA indicators are also reported on E-Codes (CP@A is reported only on diagnosis and procedure fields) and thus more data will be reported. Also, the use of a national standard when applicable is part of our mandate, stated in Sections 128735, 128736, and 128737.

This regulation package also proposes that the new data element "Principal Language Spoken" be reported with discharges and encounters occurring on or after January 1, 2009. Many facilities are already collecting this data because of its relevance to patient safety. The regulations will provide a standard way to report that data.

SB 680, Figueroa, (Statute of 2001), incorporated into the California Health and Safety Code in Sections 128735(g)(5), 128736(a)(5), and 128737(a)(5), required that "Principal Language Spoken" (PLS) be added as a data element to both inpatient and outpatient OSHPD data collection.

More recently AB 800, Yee, (Statute of 2006), incorporated into the California Health and Safety Code in Section 123147, also requires that a patient's principal spoken language be included in a patient's health record. The Census 2000 Summary File #3, prepared by the U. S. Census Bureau, shows that approximately 40% of Californians speak a language other than English at home. Poor communication between providers and patients can lead to lack of understanding that can have a negative impact on health care. Capturing principal language spoken will highlight the need for health care delivered in a language that both the provider and patient understand.

This regulations package also adds place-holder spaces to the Inpatient File Format and Specifications to allow for the eventual collection of ICD-10 codes. (These place-holder spaces are already included in the ED and AS File and Format Specifications.) Facilities will already be updating their computer systems to accommodate the new PLS data element and the POA indicators on E-Codes so the additional cost of accommodating ICD-10 placeholder spaces at the same time should be minimal.

This regulation package also makes the following minor changes: Table 1 (in Section 97248) is updated to remove a Condition Present at Admission default and also includes the unrelated removal of an unused Discharge Date default from the Table. There is also an unrelated clean-up change to delete a sentence from Section 97241 that provides outdated information about the availability of certain facility notices through MIRCal.

The following materials are available for review:

#### Section 97215. Format.

- Format and File Specifications for MIRCal Online Transmission Inpatient Data Effective with discharges occurring on or after July 1, 2008, revised on June 28, 2007
- Format and File Specifications for MIRCal Online Transmission Emergency Department and Ambulatory Surgery Data Effective with encounters occurring on or after January 1, 2009, revised on July 12, 2007

#### Section 97244. Method of Submission.

- Hospital Inpatient Data Record Manual Abstract Reporting Form (1370.IP), Effective with discharges occurring on or after July 1, 2008, revised January 18, 2008
- Hospital Inpatient Data Record Manual Abstract Reporting Form (1370.IP), Effective with discharges occurring on or after January 1, 2009, revised February 26, 2008
- Emergency Department Data Record Manual Abstract Reporting Form (1370.ED), Effective with encounters occurring on or after January 1, 2009, revised February 26, 2008
- Ambulatory Surgery Data Record Manual Abstract Reporting Form (1370.AS), Effective with encounters occurring on or after January 1, 2009, revised February 26, 2008

### AVAILABILITY OF THE TEXT OF PROPOSED REGULATIONS, INITIAL STATEMENT OF REASONS, AND RULEMAKING FILE

#### INTERNET AVAILABILITY

Materials regarding this notice of proposed changes, the text of the proposed regulations, the Initial Statement of Reasons, and all of the updated forms, information upon which the rulemaking is based, and the Final Statement of Reasons may be accessed at the OSHPD website [www.oshpd.ca.gov](http://www.oshpd.ca.gov).

#### AVAILABILITY OF CHANGED OR MODIFIED TEXT

The text of proposed changes or modifications to the regulations will be available from the OSHPD website [www.oshpd.ca.gov/hid](http://www.oshpd.ca.gov/hid) and will be available from OSHPD upon request. The text of any modified regulation, unless the modification is non-substantial or solely grammatical in nature, will be made available on the

website at least 15 days prior to the date that OSHPD adopts the regulation. The changes will be underlined where text is added and ~~struckthrough~~ where text is deleted. OSHPD may adopt, amend, or repeal the foregoing proposal substantially as set forth without further notice.

### ALTERNATIVES CONSIDERED

OSHPD has determined in accordance with Government Code Section 11346.5(a)(13) that no reasonable alternative considered by OSHPD or that has otherwise been identified and brought to the attention of OSHPD would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

### FISCAL IMPACT ESTIMATES

Local Mandate Determination (Cal. Gov't Code 11346.5(a)(5)): As the proposed updates will impose requirements upon all California hospitals, and all licensed Ambulatory Surgery clinics, and will only incidentally affect governmental hospitals, there is no local mandate created by the proposed revisions that would require state reimbursement.

1. Estimate of Cost or Savings to Any State Agency (Cal. Gov't Code 11346.5(a)(6)): None.
2. Cost to Any Local Agency or School District That is Required to be Reimbursed by the State (Cal. Gov't Code, 11346.5(a)(6)): None.
3. Non-Discretionary Cost or Savings Imposed on Local Agencies (Cal. Gov't Code 11346.5(a)(6)): None.
4. Cost or Savings in Federal Funding to the State (Cal. Gov't Code 11346.5(a)(6)): None.
5. Impact on Housing Costs (Cal. Gov't Code (11346.5(a)(12)): None.
6. Potential Cost Impact on Private Persons or Affected Business, Other Than Small Businesses (Cal. Gov't Code, 11346.5(a)(9)): OSHPD is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
7. Potential Adverse Economic Impact on Businesses: All California hospitals and all licensed Ambulatory Surgery clinics may have to make adjustments to their computer systems and reporting abilities to reflect the new changes.

OSHPD has determined that the regulations would not have a significant statewide adverse economic im-

pact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

OSHPD has determined that these regulations will affect all California Licensed Ambulatory Surgery Clinics. 71 California Licensed Ambulatory Surgery Clinics are small businesses.

### DETERMINATIONS

OSHPD has determined that the regulations would not significantly affect the following:

1. The creation or elimination of jobs within the State of California.
2. The creation of new businesses or the elimination of existing businesses within the State of California.
3. The expansion of businesses currently doing business within the State of California.

## GENERAL PUBLIC INTEREST

### DEPARTMENT OF FISH AND GAME

#### CONSISTENCY DETERMINATION Fish and Game Code Section 2080.1 Tracking Number 2080-2008-007-01

PROJECT: Lewiston-Dark Gulch Rehabilitation Site, Trinity River Mile 105.4 to 111.7  
LOCATION: Trinity River near Weaverville, Trinity County  
NOTIFIER: Trinity County Resource Conservation District

### BACKGROUND

The Trinity County Resource Conservation District (TCRCD) and U.S. Department of Interior, Bureau of Reclamation (BOR) propose to rehabilitate salmonid habitat in the 6.3 mile Trinity River reach from River Mile 105.4 to 111.7 (the Lewiston-Dark Gulch Rehabilitation Site) (hereafter, the Project). The Department of Fish and Game (DFG) has determined that a primary outcome of the Project will be physical and biological improvements to salmonid habitat resulting in enhanced fish passage, survival, and reproduction for Southern Oregon/Northern California Coast ESU coho salmon (*Oncorhynchus kisutch*) (SONCC coho salmon) listed as threatened pursuant to both the federal En-

dangered Species Act (ESA) (16 U.S.C. § 1531 *et seq.*) and the California Endangered Species Act (CESA) (Fish and Game Code § 2050 *et seq.*). However, implementation of flow adjustment and rehabilitation activities to benefit SONCC coho salmon could also result in take of the species and temporary adverse impacts to the species' spawning and rearing habitat due to distribution of suspended sediment produced by Project implementation. DFG is issuing this determination pursuant to Fish and Game Code § 2080.1 that the federal biological opinion and incidental take statement covering the Project also meet CESA such that no further authorization is necessary for the Project to take SONCC coho salmon.

In December 2000, the Secretary of Interior signed a Record of Decision (ROD) for the Trinity Mainstem River Fishery Restoration Final Environmental Impact Statement (TRMFR FEIS). This decision recognized that restoration and maintenance of the Trinity River's fishery resources requires rehabilitating the river itself, and restoring the attributes that produce a healthy, functioning alluvial river system. Consequently, the ROD included five components to ensure long-term restoration and maintenance of the Trinity River:

- a) Variable annual instream flows ranging from 369,000 acre-feet (af) in critically dry years to 815,000 af in extremely wet years;
- b) Physical channel rehabilitation, including the removal of riparian berms and the establishment of side channel habitat;
- c) Sediment management, including the supplementation of spawning gravels below Lewiston Dam and reduction in fine sediments which degrade fish habitats;
- d) Watershed restoration efforts, addressing negative impacts which have resulted from land use practices in the Trinity River Basin; and
- e) Infrastructure improvements or modifications, including rebuilding or fortifying bridges and addressing other structures affected by peak instream flows as provided by the ROD.

Because of the potential for activities identified in the ROD to take SONCC coho salmon, BOR consulted with the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) under Section 7 of the ESA, and on October 12, 2000, NMFS issued a Biological Opinion (151422-SWR-2000-AR8271:FR)(BO) and incidental take statement (ITS), which describes the activities proposed in the TRMFR FEIS, including conservation measures developed to minimize impacts to SONCC coho salmon and its habitat during implementation of the rehabilitation effort. NMFS also concluded that the improvements to the Trinity River system through im-

plementation of the activities would result in a net benefit to Trinity River salmon and steelhead populations and that the program is a necessary component of recovery efforts.

In order to facilitate implementation of the 47 mechanical rehabilitation projects identified in the ROD, the BOR formed the Trinity River Restoration Program (TRRP) in 2002. Under the program, local sponsors partner with BOR to implement the rehabilitation projects in their jurisdiction. The ROD identifies this Project as a necessary step towards restoration of the Trinity River's fisheries and will allow for high efficiency sediment transport, restore coldwater fishery beneficial uses and eventually remove the Trinity River from the California Clean Water Act Section 303(d) Impaired Waterbodies List. Construction is expected to begin in summer 2008 with construction and revegetation components completed by 2009. Gravel augmentation during high flows only will begin in 2008 and continue annually thereafter. Impacts to SONCC coho salmon could occur due to work within the channel to remove bottlenecks to coarse sediment delivery, to rebuild the historic alluvial channel, to revegetate and provide for survival of native riparian vegetation and to recreate complex fish habitat and point bars. TCRCD, as lead agency under the California Environmental Quality Act for the Project, analyzed the potential environmental effects of the Project in a Focused Environmental Impact Report (FEIR), which TCRCD certified on February 20, 2008. The FEIR identified several additional site-specific mitigation measures to further minimize impacts to SONCC coho salmon during rehabilitation activities.

On March 4, 2008, the Director of DFG received a notice from TCRCD pursuant to Section 2080.1 of the Fish and Game Code, requesting a determination that the above-referenced BO/ITS is consistent with CESA for purposes of the proposed Lewiston-Dark Gulch Rehabilitation Site Project. included in TCRCD's request was a May 15, 2006, letter from NMFS amending the BO to allow heavy machinery to work within the Trinity River channel, which was deemed necessary by BOR to carry out program goals and objectives as detailed within the ROD. On March 28, 2008, NMFS issued an additional letter documenting its determination that the mitigation measures contained in the FEIR for the Project, including restricting in-channel activities to a July 15 to September 15 seasonal window, were consistent with the October 2000 BO/ITS and would minimize the likelihood of incidental take of SONCC coho salmon. In issuing the amendments, NMFS asserted that adverse effects on SONCC coho salmon from in-channel work are unlikely to be any greater than those considered by the BO because SONCC coho salmon primarily utilize tributary habitat for spawning and rearing, and



construction will occur in the summer and fall period when flows are low and mainstem habitat use by juvenile SONCC coho salmon is minimal. Although NMFS determined that turbid water from in-channel work will likely affect the small population of juvenile SONCC coho salmon which may be present by forcing fish to move incrementally further downstream than was contemplated by the BO, NMFS expects that all displaced juvenile fish will find suitable rearing habitat downstream of any project disturbances.

## DETERMINATION

DFG has determined that the BO, including its ITS, is consistent with CESA for this Project because the mitigation measures therein meet the conditions set forth in Fish and Game Code section 2081, subparagraphs (b) and (c), for authorizing the incidental take of CESA-listed species. Important to DFG's determination are measures identified in the BO as well as the additional site-specific measures described in the Project's FEIR, which were approved by NMFS in the March 2008 letter. Specifically, DFG finds that the take of SONCC coho salmon will be incidental to an otherwise lawful activity (i.e., restoration of the Trinity River channel to improve salmonid habitat as directed by the ROD), the mitigation measures identified in the BO and required by the ITS, as well as the measures identified in the FEIR will minimize the impacts of the authorized take, the creation of greatly improved habitat for juvenile SONCC coho salmon will fully mitigate the impacts of the authorized take, and the Project will not jeopardize the continued existence of the species. The measures in the BO as amended include, but are not limited to, the following:

### 1. Minimize turbidity:

- a. TCRCD/BOR will implement all practical measures to minimize sedimentation/turbidity in the mainstem arising from the proposed mechanical disturbances.
- b. TCRCD/BOR will coordinate with the NMFS and other resource agency partners to develop construction techniques which might further reduce turbidity impacts.
- c. As described in Appendix 2 of the Project FEIR, turbidity increases associated with project construction activities shall not exceed the Regional Water Quality Control Board (Regional Water Board) water quality objectives for turbidity in the Trinity River basin. Turbidity levels are defined in nephelometric turbidity units (NTUs). The current threshold for turbidity levels in the Trinity River, as listed in the Basin Plan for the

North Coast Region (2001), states that turbidity shall not be increased by more than 20 percent above naturally occurring background levels.

### 2. Flow management:

- a. TCRCD/BOR shall immediately implement the components of the proposed flow schedule (as described in the TRMFR FEIS, page 2-19, Table 2-5) equal to or less than 6,000 CFS, and implement the entire flow schedule as soon as possible.
- b. As necessary infrastructure modifications are made, BOR shall incrementally implement higher Trinity River flows (consistent with the proposed flow regime).
- c. TCRCD/BOR shall provide two reports per year detailing flows released into the Trinity River below Lewiston Dam; reports will be provided to the NMFS (1655 Heindon Road, Arcata, CA 95521) by August 31, and March 31, annually.
- d. BOR shall initiate emergency consultation procedures during implementation of any flood control or "safety of dam" releases, pursuant to 50, CFR, §402.05.
- e. BOR shall be prepared to make use of the auxiliary bypass outlets on Trinity Dam as needed, and pursuant to re-initiation of ESA Section 7 consultation regarding Sacramento River Winter-run Chinook salmon, to protect water quality standards; associated actions may include modification of the export schedule of Trinity Basin diversions to the Sacramento River.
- f. As described in Appendix 2 of the Project FEIR, monitoring of the rehabilitated floodplain sites for salmon fry stranding shall be performed by a qualified fishery biologist immediately after recession of flood flow events designated as a 1.5-year or less frequent event (i.e.,  $Q > 6,000$  cfs) for a period of 3 years following construction. These flows, and associated fry stranding surveys, would occur most frequently between January and May. If substantial stranding is observed, TCRCD/BOR will take appropriate measures to return stranded fishes to river habitats and to modify floodplain topography to reduce the likelihood of future occurrences of fry stranding.

### 3. Habitat rehabilitation:

- a. BOR shall meet with the NMFS annually in March to coordinate during the advanced development and scheduling of habitat rehabilitation projects, including mainstem channel rehabilitation projects, sediment augmentation program, and dredging of sediment collection pools.



- b. BOR shall provide for review of individual mainstem channel rehabilitation projects via the technical team ('designated team of scientists' [USFWS and BOR 2000], 'technical modeling and analysis team' [TRMFR DEIS]) or equivalent group, and provide a written recommendation to the NMFS whether the projects are similar to those described in the TRMFR DEIS and should be covered by this ITS; if the technical team determines that these projects and their impacts to aquatic habitat are substantially different than described in the TRMFR DEIS and USFWS and BOR (2000), the technical team will recommend to the NMFS that additional Federal Endangered Species Act (ESA) Section 7 consultation is appropriate.
- c. To avoid or minimize potential injury and mortality of fish during riverine activities (removal of grade control structures, channel crossings, addition and grading of coarse sediment) TCRCD, as described in Appendix 2 of the Project FEIR, shall operate equipment slowly and deliberately to alert and scare adult and juvenile salmonids away from the work area.
- d. To avoid or minimize potential injury and mortality of fish during excavation and placement of fill materials within the active low-flow channel, TCRCD, as described in Appendix 2 of the Project FEIR, shall operate equipment slowly and deliberately to alert and scare adult and juvenile salmonids away from the work area. The contractor shall be instructed that before submerging an excavator bucket or laying gravel below the water surface, the excavator bucket will be operated to "tap" the surface of the water, or a person will wade ahead of fill placement equipment to scare fish away from the work area. To avoid impacts to mobile life stages of salmonids that may be present in the water column, the first layers of clean gravel that are being placed into the wetted channel shall be added slowly and deliberately to allow fish to move from the work area.
- e. The primary outcome of the Project will be physical and biological improvements to the species habitat that will result in enhancements in fish passage, survival, and reproduction. This anticipated increase in juvenile production and survivorship will fully mitigate for the level of coho mortality and disturbance attributed to this project.

4. Funding:

- a. TCRCD will implement this Restoration Project partially by funds received from DFG's Klamath River Restoration Grant Program. In May 2007, DFG issued consistency determination 2080-2007-010-01, finding that projects and programs funded through its Fisheries Restoration Grant Program and pursuant to the terms of NMFS Biological Opinion No. 151422SWR03AR8912:FRR/JTJ, could incidentally take SONCC coho salmon.

Based on this consistency determination, TCRCD does not need to obtain authorization from DFG under CESA for take of SONCC coho salmon that occurs in carrying out the Project, provided TCRCD implements the Project as described in the BO, as amended (including the Conservation Measures), and complies with the mitigation measures and other conditions described in the BO and ITS, including the amendments. However, if the Project as described in the amended BO, including the mitigation measures therein, changes, or if NMFS amends or replaces the BO, TCRCD will need to obtain from DFG a new consistency determination (in accordance with Fish and Game Code section 2080.1) or an incidental take permit (in accordance with Fish and Game Code section 2081).

**PROPOSITION 65**

**OFFICE OF ENVIRONMENTAL  
HEALTH HAZARD ASSESSMENT**

**CALIFORNIA ENVIRONMENTAL  
PROTECTION AGENCY  
OFFICE OF ENVIRONMENTAL HEALTH  
HAZARD ASSESSMENT**

**SAFE DRINKING WATER AND TOXIC  
ENFORCEMENT ACT OF 1986  
(Proposition 65)**

**Chemicals Under Consideration For Possible  
Listing  
Via The Authoritative Bodies Mechanism:  
Request For Relevant Information  
EXTENSION OF PUBLIC COMMENT PERIOD  
March 7, 2008**

On January 25, 2008, the Office of Environmental Health Hazard Assessment (OEHA) published a no-

tice in the *California Regulatory Notice Register* (Register 2008, No. 4–Z) soliciting information which may be relevant to the evaluation of certain chemicals under consideration for possible administrative listing within the context of the Proposition 65 administrative listing regulatory criteria in Title 22 of the California Code of Regulations Section 12306.

OEHHA has received a request to extend the comment period for *4-methylimidazole* to allow for the submittal of complete and relevant scientific information. OEHHA hereby extends the public comment period for *4-methylimidazole* to **5 p.m., Thursday, April 24, 2008**. Please note that the 60-day public comment period initiated on January 25, 2008 for *dibromoacetic acid* will close as announced on March 25, 2008.

Written comments, along with supporting information, may be submitted in **triplicate** to:

Ms. Cynthia Oshita  
Office of Environmental Health Hazard Assessment  
Street Address: 1001 I Street  
Sacramento, California 95814  
Mailing Address: P.O. Box 4010, MS–19B  
Sacramento, California 95812–4010  
Fax. No.: (916) 323–8803  
Telephone: (916) 445–6900  
Or via email addressed to [coshita@oehha.ca.gov](mailto:coshita@oehha.ca.gov)

**Comments may also be delivered in person or by courier to the above address. It is requested, but not required, that written comments and supporting documentation be transmitted via email addressed to: [coshita@oehha.ca.gov](mailto:coshita@oehha.ca.gov). In order to be considered, comments must be received at OEHHA by 5:00 p.m. on Thursday, April 24, 2008.**

**OFFICE OF ENVIRONMENTAL  
HEALTH HAZARD ASSESSMENT**

**CALIFORNIA ENVIRONMENTAL  
PROTECTION AGENCY  
OFFICE OF ENVIRONMENTAL HEALTH  
HAZARD ASSESSMENT**

**SAFE DRINKING WATER AND TOXIC  
ENFORCEMENT ACT OF 1986  
(PROPOSITION 65)**

**NOTICE OF INTENT TO LIST CHEMICAL  
April 18, 2008**

The Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as Proposition 65), codified at Health and Safety Code section 25249.5 et seq., pro-

vides two primary mechanisms for administratively listing chemicals that are known to the State to cause cancer or reproductive toxicity (Health and Safety Code section 25249.8(b)). A chemical may be listed under Proposition 65 when a body considered to be authoritative by the state's qualified experts has formally identified the chemical as causing cancer or reproductive toxicity. The following entities are identified as authoritative bodies for purposes of Proposition 65, as it pertains to chemicals known to cause cancer: the U.S. Environmental Protection Agency, the International Agency for Research on Cancer, the U.S. Food and Drug Administration, the National Institute for Occupational Safety and Health, and the National Toxicology Program. The criteria for listing chemicals through the authoritative bodies mechanism are set forth in Title 22, California Code of Regulations, section 12306.

As the lead agency for the implementation of Proposition 65, the Office of Environmental Health Hazard Assessment (OEHHA) within the California Environmental Protection Agency intends to list the chemical identified in the table below as known to the State to cause cancer, pursuant to this administrative mechanism as provided in Health and Safety Code section 25249.8(b) and Title 22, Cal. Code of Regs., section 12306.

Relevant information related to the possible listing of *dibromoacetic acid* was requested in a notice published in the *California Regulatory Notice Register* on January 25, 2008 (Register 2008, No. 4–Z). No public comments were received. OEHHA has determined that *dibromoacetic acid* meets the criteria for listing under Title 22, Cal. Code of Regs., section 12306, and therefore OEHHA is issuing this notice of intent to list *dibromoacetic acid* under Proposition 65. A document providing more detail on the basis for the listing of *dibromoacetic acid* can be obtained from OEHHA's Proposition 65 Implementation Office at the address and telephone number indicated below, or from the OEHHA Web site at: <http://www.oehha.ca.gov/>. Anyone wishing to provide comments as to whether the listing of *dibromoacetic acid* meets the criteria for listing provided in Title 22, Cal. Code of Regs., section 12306 should send written comments in **triplicate**, along with any supporting documentation, by mail or by fax to:

Ms. Cynthia Oshita  
Office of Environmental Health Hazard Assessment  
Street Address: 1001 I Street  
Sacramento, California 95814  
Mailing Address: P.O. Box 4010  
Sacramento, California 95812–4010  
Fax No.: (916) 323–8803  
Telephone: (916) 445–6900

Comments may also be delivered in person or by courier to the above address. It is requested, but not required, that written comments and supporting documentation be transmitted via email addressed to: [coshita@oehha.ca.gov](mailto:coshita@oehha.ca.gov). In order to be considered, comments must be received at OEHHA by 5:00 p.m. on Monday, May 19, 2008.

The following chemical has been determined by OEHHA to meet the criteria set forth in Title 22, Cal. Code of Regs., section 12306 for listing as causing cancer under the authoritative bodies mechanism:

Chemical	CAS No.	Reference
Dibromoacetic acid	631-64-1	NTP (2007)

#### REFERENCE

National Toxicology Program (NTP, 2007). Toxicology and Carcinogenesis Studies of Dibromoacetic Acid (CAS No. 631-64-1) in F344/N Rats and B6C3F<sub>1</sub> Mice (Drinking Water Studies). NTP Technical Report Series No. 537. NIH Publication No. 07-4475. U.S. Department of Health and Human Services, NTP, Research Triangle Park, NC.

### RULEMAKING PETITION DECISIONS

#### DEPARTMENT OF CORRECTIONS AND REHABILITATION

#### NOTICE OF DECISION ON PETITION TO AMEND REGULATIONS

**California Code of Regulations  
Title 15, Crime Prevention and Corrections  
Division 3, Adult Institutions, Programs and  
Parole**

#### PETITIONER

Melvin James Blake, B-76340.

#### AUTHORITY

The authority granted by Government Code (GC) Section 12838.5 vests to the California Department of Corrections and Rehabilitation (CDCR) all the powers,

functions, duties, responsibilities, obligations, liabilities, and jurisdiction of the abolished Youth and Adult Correctional Agency, California Department of Corrections, Department of the Youth Authority, Commission on Correctional Peace Officer Standards and Training, Board of Corrections, and the State Commission on Juvenile Justice, Crime and Delinquency Prevention. Penal Code (PC) Section 5050 provides that commencing July 1, 2005, any reference to the Director of Corrections refers to the Secretary of the CDCR. PC Section 5054 vests with the Secretary of the CDCR the supervision, management, and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of persons confined therein. PC Section 5055 provides that commencing July 1, 2005, all powers/duties previously granted to and imposed upon the CDC shall be exercised by the Secretary of the CDCR. PC Section 5058 provides that the Director may prescribe and amend regulations for the administration of prisons.

#### CONTACT PERSON

Please direct any inquiries regarding this action to Timothy M. Lockwood, Chief, Regulation and Policy Management Branch, Department of Corrections and Rehabilitation, P.O. Box 942883, Sacramento, CA. 94283-0001.

#### AVAILABILITY OF PETITION

The petition to amend regulations is available upon request directed to the Department's contact person.

#### SUMMARY OF PETITION

Petitioner contends the warden at Avenal State Prison (ASP) did not have the authority to submit a request to be exempt from the Personal Property items detailed in the Authorized Personal Property Schedule (APPS) Matrix, specifically "dormitory housing excluded from AC Appliances and restricted to battery operated appliances only." Petitioner requests the general prison population (Privilege Groups A and B) at ASP be allowed to purchase, own, and possess electrical appliances in accordance to the specification delineated in the APPS matrix as "Registerable Property for Level II, III, Camp, and Community Correctional Facilities Male inmates.

#### DEPARTMENT DECISION

The Secretary of the CDCR declines the petition in its entirety.

ASP was granted an exemption for AC appliances in all dormitory housing. The exemption was based upon limitations of the current physical plant, safety, and security concerns resulting from extension cords creating hazards in an open dormitory environment. The option of upgrading the physical plant to permit individual AC outlets for each inmate is cost prohibitive. ASP continues to permit battery operated appliances in dormitories and has also increased the allowable limit for batteries from 8 to 16. Battery recycling is a standard part of each institution's Recycling and Salvage Program and therefore, cost of disposal of these batteries is not an issue. While the CDCR would prefer to permit dormitory inmates to possess personal AC appliances, physical plant limitations make this impractical and unsafe.

The restriction is based upon safety and security issues inherent in dormitory housing. The CDCR contends that the APPS is clearly designed around privilege groups as an incentive for positive programming.

The CDCR asserts all inmates are subject to restrictions relative to physical plant limitations. The only restriction applied to inmates at ASP is the restriction from AC appliances. This is a very common restriction in dormitory settings. Local facility administration may immediately act on any exemption request if it is based on safety or security needs.

## OAL REGULATORY DETERMINATIONS

### OFFICE OF ADMINISTRATIVE LAW

#### DETERMINATION OF ALLEGED UNDERGROUND REGULATION (Summary Disposition)

(Pursuant to Government Code Section  
11340.5 and  
Title 1, section 270, of the  
California Code of Regulations)

#### MOJAVE DESERT AIR QUALITY MANAGEMENT DISTRICT

Date: April 7, 2008  
To: Center on Race, Poverty and the Environment and Norman Diaz  
From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 3(S)**  
**(CTU 2008-0206-01)**  
(Issued pursuant to Gov. Code, sec. 11340.5;  
Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging as an underground regulation a new cost-effectiveness threshold for particulate matter pollution controls

On February 6, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the new cost-effectiveness threshold for particulate matter pollution controls issued by the Mojave Desert Air Quality Management District (MDAQMD) is an underground regulation.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not, adopted pursuant to the Administrative Procedure Act (APA). Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

If a rule meets the definition of a regulation in Government Code section 11342.600, but was not adopted pursuant to the APA, it may be an "underground regulation" as defined in California Code of Regulations, title 1, section 250<sup>1</sup>. Section 11342.600 defines a regulation as:

"Regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any state agency* to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure. (Emphasis added.)

To be a regulation subject to the APA, the challenged rule must be adopted by a state agency. If the MDAQMD is not a state agency, it is not subject to the APA and its rules cannot be underground regulations as defined in the APA.

Air Quality Management Districts (AQMD) were created by Health and Safety Code sections 40000 and following. Section 40001 states:

(a) Subject to the powers and duties of the state [Air Resources Board], the districts shall adopt

<sup>1</sup> (a) "Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.



and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction, and shall enforce all applicable provisions of state and federal law.

In *The People v. A-1 Roofing*, (1978) 87 Cal.App 3d Supp 1, at page 10, the court held that this language in Health and Safety Code section 40001:

means only that the Air Resources Board maintains a superior position to that of local districts, so as to assure that their regulations do not conflict with its overall responsibilities and programs. The section does not make each district into a "state agency" or require that its regulations be filed with the Secretary of State.

Based on the holding of the court and the language in the Health and Safety Code, we find that the MDAQMD is not a state agency and its rules do not meet the definition of a regulation in Government Code section 11342.600. The rule challenged in the petition was adopted by the MDAQMD and is not subject to the APA and is, therefore, not an underground regulation.

We note, however, that while OAL cannot find that the challenged rule is an underground regulation, rules and regulations adopted by AQMDs must comply with the requirements established in Health and Safety Code sections 40725 and following. These rules and regulations must be submitted to the Air Resources Board which is responsible for final approval. A challenge to a rule or regulation of an AQMD is more properly addressed to the Air Resources Board or to a court of competent jurisdiction.

Date: April 7, 2008

/s/  
Kathleen Eddy  
Senior Counsel

/s/  
Susan Lapsley  
Director

Office of Administrative Law  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814  
(916) 323-6225

## ACCEPTANCE OF PETITION TO REVIEW ALLEGED UNDERGROUND REGULATIONS

### DEPARTMENT OF MENTAL HEALTH

#### PETITION TO THE OFFICE OF ADMINISTRATIVE LAW

RE: **ALLEGED UNDERGROUND  
REGULATION**

FROM: MICHAEL GEORGE ST.MARTIN,  
Petitioner

DATE: January 9, 2008

This is a computer generated petition based on the optional OAL form supplying the information required by Title 1, California Code of Regulations, §280, for a petition challenging an alleged underground regulation.

#### 1. Identifying Information: **Petitioner**

Your Name: **MICHAEL GEORGE  
ST.MARTIN  
CO-000414-3, RRU-7**

Your Address: **P.O. Box 5003, Coalinga, CA  
93210**

Your Telephone  
Number: **(559) 934-0391 or (559) 934-0392**

Your E-Mail  
(if you have one): michaelst.martin@hotmail.com

#### 2. State Agency or Department being challenged:

**California Department of Mental Health ("DMH")**

**3. Provide a complete description of the purported underground regulation. Attach a written copy of it. If the purported underground regulation is found in an agency manual, identify the specific provision of the manual alleged to comprise the underground regulation. Please be as precise as possible.**

#### **Description of alleged Underground Regulation**

The DMH issued the CLINICAL EVALUATOR HANDBOOK AND STANDARDIZED ASSESSMENT PROTOCOL (hereinafter "Protocol")

without following the requirements of the Administrative Procedures Act. The DMH has revised this Protocol several times, most recently in August 2007. Petitioner is including a copy of the 2007 revision. The covers of both the 2004 edition and the 2007 revision are identical and contain the following:

**SEX OFFENDER COMMITMENT  
PROGRAM (SOCP)  
WIC 6600 (SEXUALLY VIOLENT PREDATOR)**

**CLINICAL EVALUATOR HANDBOOK  
AND  
STANDARDIZED ASSESSMENT PROTOCOL  
AUGUST 2007  
California Department of Mental Health  
Sacramento, California**

The Protocol (2004) is a 34–page manual, and the Protocol (2007) is a 38–page manual, each with several additional pages of appendices. Throughout the Protocol, the words “Must” and “Required” are used repeatedly. These are mandatory words, and when used in the language of the Protocol, create a mandatory instruction, criterion, or manual, which is a Standard of General Application utilized for the entire class of persons subject to Civil Commitment under the SVPA Statute. Furthermore, the Protocol is replete with references to the Sexually Violent Predator Act and thus the Protocol implements, interprets, or makes specific the SVPA.

Petitioner alleges the entire Protocol is an underground regulation, as there is no evidence that any portion of this mandatory directive has been promulgated pursuant to the Administrative Procedures Act.

A true and correct copy of the  
**Clinical Evaluator Handbook and Standardized  
Assessment Protocol (2007)**  
is attached hereto as EXHIBIT A.

**The Clinical Evaluator Handbook and  
Standardized Assessment Protocol  
Is a Regulation Within the Meaning of the APA**

Welfare & Institutions Code section 6601(c) requires the Director of the Department of Mental Health (DMH) to develop a standardized assessment protocol for evaluations of persons considered for commitment pursuant to the Sexually Violent Predator Act (SVPA):

“(c) The State Department of Mental Health shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator . . . The Standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder.”

Thus in 1996, the California Department of Mental Health was instructed by the California Legislature to develop and update a standardized assessment protocol. However, the Department has failed or refused to adopt, in substantive compliance with the Administrative Procedures Act, any version of their Clinical Evaluator Handbook and Standardized Assessment Protocol upon which Psychological Evaluations for persons considered for Civil Commitment must be based.

Prior to implementation, or revision thereof, the Department was required to adopt the Protocol, or any revision thereof, but failed to do so, and thus, pursuant to the law the current Protocol being utilized is invalid and an “Underground Regulation.”

Though the Director may prescribe rules and regulations such as the mandated protocol of section 6601(c), they must be promulgated and filed per Chapter 3.5 of art. 1 of Division 3 of Title 2 of the Administrative Procedures Act, government Code, section 11340 et seq. There is no evidence that DMH has promulgated the Standardized Assessment Protocol, Evaluator’s Handbook (either 2004, or 2007) pursuant to the APA.

The protocol is a regulation. Chapter 3.5, article 5, of the Administrative Procedure Act, Govt. Code sections 11346 et seq., governs adoption, amendment and repeal of regulations by administrative agencies known as rulemaking. Govt. Code section 11342.600 provides that:

“[A regulation is] every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret or make specific the law enforced or administered by it or to govern its procedure.”

Syngenta Crop Protection, Inc. V. Helliker (2d Dist. 2006) 138 Cal.App. 4<sup>th</sup> 1135, 1175–77, 42 Cal.Rptr.3d 191, 221–222, quotes Tidewater Marine Western, Inc.

v. Bradshaw (1996) 14 Cal. 4th 557, 59 Cal.Rptr.2d 186, which explains:

“[The APA] establishes ‘minimum procedural requirements’ for rulemaking. ([Govt. C.] § 11346(a).) The agency must provide notice of the proposed action (*Id.* §§ 11346.4, 11346.5), the complete text of the proposal (§ 11346.2(a)), and an initial statement of reasons for the proposal (§ 11346.2(b)), and a final statement of reasons (§ 11346.9(a)). The agency must provide a public hearing if an interested person timely requests a hearing (§ 11346.8(a)), provide an opportunity for interested persons to submit written comments if no hearing is held (*ibid.*), and respond in writing to comments in the final statement of reasons (§ 11346.9(a)(3)). The agency must submit the entire rulemaking file to the Office of Administrative Law (§§ 11347.3(c), 11342.550), which reviews the regulation for compliance with the law and other criteria and approves or disapproves the regulatory action. (§§ 11349.1, 11349.3. . . .” (14 Cal. 4th 557, 59 Cal.Rptr.2d 186.)

“No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.” (Govt. Code § 11340.5(a).)

“A substantial failure to comply with chapter 3.5 of the APA renders the regulation invalid. § 11350(a); *Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal. 4th at 576, 59 Cal.Rptr.2d 186.”

“A regulation subject to the APA thus has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. . . . Second, the rule must ‘implement, interpret, or make specific, the law enforced or administered by [the agency], or . . . govern [the agency’s] procedure.’ ([Former] Govt. Code § 11342(g) [now § 11342.601].) Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases. . . . Similarly, agencies may provide private parties with advice letters,

which are not subject to the rulemaking provisions of the APA. ([Former] Govt Code § 11343(a)(3), 11346.1(a) [now § 11340.9(I)].) Thus, if an agency prepares a policy manual that is no more than a summary, without commentary, of the agency’s prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations . . . A policy manual of this kind would of course be no more binding on the agency in subsequent agency proceedings or on the courts when reviewing agency proceedings than are the decisions and advice letters that it summarizes.”(Emphasis added.) (*Tidewater Marine Western, Inc. v. Bradshaw*, *supra*, 14 Cal. 4th at 571, 59 Cal.Rptr.2d 186.)”

*Morning Star Co. v. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333–334, 42 Cal.Rptr.3d 47, 53–54, confirms the Syngenta/Tidewater analysis, especially that a regulation must be intended to apply generally, and that it must implement, interpret or make specific the law administered by the agency, or govern the agency’s procedure.

The protocol is a regulation. It is applied to all persons proposed or adjudicated to be SVPs in California. It declares how this certain class of cases will be decided. Its use by all state evaluators is mandatory. They must prepare the reports which are utilized to support their professional opinions that the person examined is an SVP pursuant to the Protocol. Thus the mandate the Protocol implements, enforces or otherwise makes specific is the language of the Sexually Violent Predators Act (SVPA). The following excerpts from the Protocol mandate specific actions and make clear that the Evaluators Handbook & Standardized Assessment Protocol is a regulation:

1. “Evaluator Panel,” (2004, p.2) (2007, p.2) “Evaluators are required to interview and evaluate persons in accordance with the protocol contained within this handbook . . . .”
2. “Standardized Assessment Protocol,” (2004, p.2) (2007, p.2) “This handbook and all supplemental instructions to DMH staff and contractors in the implementation of the SVP law is the required standardized assessment protocol.”
3. “Special requests from Courts & Attorneys,” (2004, p.4) (2007, p.4) “DMH expects that evaluators will notify the SOCP [Sex Offender Commitment Program] Unit in Sacramento of all Court Orders and Attorney Requests that do not conform to these policies and procedures. DMH will then direct the evaluator in his/her response to such orders/requests.”
4. “The Clinical Interview,” (2004, pp. 8–10) (2007, pp. 9–11) “These evaluations need to

provide the courts with more than just a summary of professional conclusions.” (This entire section instructs the evaluator how to conduct the interview.)

5. “Historical Information,” (2004, p.10) (2007, p.11) “Reliable history and prior clinical evaluations from the inmate’s records should be used to provide a basis for decision making in SVP evaluations.”

6. “Subpoenas & Depositions,” (2004, p.12) (2007, p.14) “If you receive such a subpoena, notify DMH who will advise you how to proceed.”

7. “Psychological Testing,” (2004, p.19) (2007, p. 20) “While evaluators may organize their risk assessment in their own unique way, they must rely on the guidelines of this protocol and include the following elements of risk assessment.”

8. Protocol (2004, pp.19–29) (2007, pp. 18–32) Contains detailed mandatory instructions in every facet of the clinical evaluation.

9. Protocol (2004, p. 32, ¶ 1) (2007, p. 35, ¶ 1) “Since the person has been committed as an SVP by the court for ‘appropriate treatment’ (Welf. & Inst. Code § 6604), the department believes that a person must finish the program, including the completion of a period of outpatient supervision. Only under rather unusual circumstances would a patient being evaluated for SVP commitment extension be deemed unlikely to commit future sexually violent acts as a result of a mental disorder, if all five phases of treatment have not been completed. If this is the case, the evaluator is required to consult with the department on their conclusion.”

This is a mandated determination that the person meets the SVPA criteria if he has not completed all five phases of treatment — a determination that is for the jury to decide. This mandated determination is in direct conflict with the controlling statute’s requirement that, “The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator.” (Welf & Inst. Code § 6604.) Such a mandate also violates the guarantee of Due Process Under the Laws of both the California and United States Constitutions.

10. Protocol (2004, p. 9) (2007, p. 10) “In ‘update’ or ‘replacement’ interviews, the court may issue an order that the evaluation be tape recorded, and/or an attorney be allowed to be present. The evaluator should comply with that order. Court ordered tape recording/attorney presence does not apply to initial interviews of prison inmates, or initial interviews of persons being evaluated for an extension of commitment.”

This DMH policy, stating a court order does not apply during initial interviews of prison inmates, or the initial interviews of persons being evaluated for an extension of commitment, is in direct conflict with statutory law (CCP § 2032.530.) This policy directs the evaluators to ignore court orders for what effectively amounts to nearly all interviews conducted. Beyond initial interviews and extension of commitment interviews there are few other interviews conducted.

Throughout the Protocol, the words “Must” and “Required” are used repeatedly. When used in the language of the Protocol they create a mandatory instruction, criterion, or manual, which is a standard of general application utilized for the entire class of persons subject to civil commitment under the SVPA. Furthermore, the Protocol is replete with references to the SVPA, thus the Protocol implements, interprets, or makes specific the SVPA. Therefore the protocol is a regulation, and one which has not been adopted in compliance with the APA.

**4. Provide a description of the agency actions you believe demonstrate that it has issued, used, enforced, or attempted to enforce the purported underground regulation.**

WIC §6601(c) mandated DMH to develop and update the **Clinical Evaluator Handbook and Standardized Assessment Protocol**. The DMH published and released this handbook. WIC §6601(c) infers its use is mandatory when conducting SVP evaluations. It is used statewide by all State Evaluators when conducting SVP evaluations. Its existence and use are not in controversy. (See January 17, 2006, letter from John Rodriguez, Deputy Director, DMH, which is attached hereto as EXHIBIT B.)

The DMH has taken the firm position that the **Clinical Evaluator Handbook and Standardized Assessment Protocol** is not a regulation subject to the provisions of the APA. (See EXHIBIT B.)

Petitioner alleges that the **Clinical Evaluator Handbook and Standardized Assessment Protocol** is a regulation within the meaning of the APA.

**5. State the legal basis for believing that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11542.600 of the Government Code that no express statutory exemption to the requirements of the APA is applicable.**

NO EXCEPTION EXCLUDES THE PROTOCOL FROM THE APA PROCEDURES.

Clearly inapplicable are the provisions of Govt. Code § 11340.9 excluding:



“(d) A regulation that relates only to the internal management of the state agency . . .”

“(f) A regulation that embodies the only legally tenable interpretation of a provision of law . . .”

“(I) A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.”

*Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204–205, 149 Cal.Rptr. 1, 4 quoting from the First Report of the Senate Interim Committee on Administrative Regulations to the 1955 Legislature, documents the necessity for strict adherence to the APA. The court found this necessary so as to prevent state agencies from avoiding obedience to the APA by denominating rules as “‘policies,’ ‘interpretations,’ ‘instructions,’ ‘guides,’ ‘standards,’ or the like,” and by containing them “in internal organs of the agency such as manuals, memoranda, bulletins, or [directing them] to the public in the form of circulars or bulletins.”

*Armistead* underlined that “[R]ules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA” (emphasis added), thus provision of state personnel transactions manual governing withdrawal of resignation by state employee merited no weight as agency interpretation where such provision had not been duly promulgated and published.

The protocol in question here fits the above description perfectly. It is called a “Guidelines” but it contains mandatory language making it much more than a simple “Guideline.” Instead, it is a forbidden underground regulation without its adoption pursuant to the Administrative Procedures Act.

#### THE PROTOCOL APPLIES GENERALLY THROUGHOUT THE STATE

*Modesto City Schools v. Education Audits Appeal Panel*, (3d Dist. 2004) 123 Cal.App. 4th 1365, 1381, 20 Cal.Rptr.3d 1831, 842, holds that to be deemed an underground regulation, which would be invalid because it was not adopted in substantial compliance with the procedures of the APA, the agency must intend it to apply generally rather than in a specific case, and the agency must adopt it to implement, interpret, or make specific the law enforced by the agency.

*Kings Rehabilitation Center, Inc. V. Premo*, (3rd Dist. 1999) 69 Cal.App. 4th 215, 217, 81 Cal.Rptr.2d 406, notes:

“The APA is partly designed to eliminate the use of ‘underground’ regulations; rules which only the government knows about. If a policy or procedure falls within the definition of a regulation within the meaning of the APA, the promulgating agency must comply with the procedures for formalizing

such regulations, which include public notice and approval by the Office of Administrative Law (OAL). Failure to comply with the APA nullifies the rule. (Govt Code § 11350(a); *Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 4”) (Emphasis added.)

The protocol is neither intended nor utilized to make specific determinations but is utilized generally throughout the state when performing SVP evaluations. Thus, the protocol is a regulation that must be promulgated as a regulation but otherwise is a null and void underground regulation.

#### 6. Provide information demonstrating that the petition raises an issue of considerable public importance requiring prompt resolution.

*Morningstar* reiterates, “[2] These requirements promote the APA’s goals of bureaucratic responsiveness and public engagement in agency rulemaking. ‘One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law’s requirements so that they can conform their conduct accordingly [citation]. The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policy-makers to the public they serve, thus providing some security against bureaucratic tyranny. [Citation.]’ [132 P.3d 255] (*Tidewater, supra*, 14 Cal.4th at pp. 568–569, 59 Cal.Rptr.2d 186, 927 P.2d 296.)” (*Morning Star Co. V. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 53.)

An entire class of citizens face a potential life term of incarceration based on evaluations performed under the mandate of this alleged underground regulation. Every citizen has an interest based upon the fundamental American principles of justice and freedom to have every law, rule, regulation, policy, procedure, guideline, criterion, bulletin, manual, instruction, order, or standard used in any procedure which could aid to deprive any citizen of his liberty to be legally promulgated prior to its implementation.

#### 7. (Optional) Please attach any additional relevant information that will assist OAL in evaluating your petition.

In 2005, Mr. Klint Pheneger, AT #053148–8, Unit 23, ASH, requested that the DMH promulgate rules and regulations regarding implementation of the Sexually Violent Predator Act (SVPA). On January 17, 2006, John Rodriguez, Deputy Director, DMH, replied to Mr. Pheneger’s request with a four–page letter summarizing DMH rationale for refusing to promulgate these

regulations. The essence of the DMH position is summed up as “. . . it is not necessary, appropriate, or practicable for DMH to promulgate regulations . . .” (Rodriguez letter, p. 4.)

Mr. Rodriguez states, “You do, on page three of your letter, state that ‘the SVPA is not sufficiently precise’ and that the ‘SVPA is not a self executing enactment,’ and this appears to be the basis for your assumption that regulations are necessary. However, as explained below, the SVPA is quite detailed and precise and the SVPA is self-executing.” (Rodriguez letter, p. 4.)

Mr. Rodriguez devotes several paragraphs explaining why the SVPA is self-executing, and why he believes this relieves DMH from promulgating regulations. However, this completely ignores the statutory requirement of Welfare & Institutions Code section 6601(c), which states in pertinent part, “The State Department of Mental Health shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health . . .”

Nowhere in the SVPA is there an exemption from the requirements of the APA, nor does one of those contained in Govt. Code § 11340.9 apply.

It is not a regulation that relates only to the internal management of the state agency. (§ 11340.9(d).)

It is not a regulation that embodies the only legally tenable interpretation of a provision of law. (§ 11340.9(f).)

In fact, the Protocol contains many mandates that petitioner alleges are in direct conflict with statutory law and constitutional law.

It is not a regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state. (§ 11340.9(i).)

In fact, the Protocol is applied to all persons proposed or adjudicated to be SVPs in California. “The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. . . . (Tidewater Marine Western, Inc. v. Bradshaw, supra, 14 Cal. 4<sup>th</sup> at 571, 59 Cal.Rptr.2d 186.)” (*Morning Star Co. V. State Bd. Of Equalization* (2006), 38 Cal. 4<sup>th</sup> 324, 333, 42 Cal.Rptr.3d 47, 55)

Mr. Rodriguez states, “it is not appropriate or practicable for DMH to attempt to promulgate regulations regarding the details of how the clinicians exercise professional judgement in conducting SVP evaluations.” (Rodriguez letter, p. 2).

After summarizing the SVPA commitment process, Mr. Rodriguez states, “Moreover, as set forth in the SVP statute, any person subject to possible commitment as an SVP has an exhaustive set of due process protections.” (Rodriguez letter, p. 2).

Mr. Rodriguez does not point to, nor can petitioner find, any exception, based on a citizen having due process protections in another arena, which relieve any state agency or department from the requirements of the APA in their rulemaking.

“Since the available studies and literature is constantly being augmented, the clinical standards of the professions of psychology and psychiatry evolve over time, and DMH does not have authority to dictate or control the standards of the clinical professions of psychology and psychiatry, it is not appropriate or practicable for DMH to attempt to promulgate regulations regarding the details of how the clinicians exercise professional judgement in conducting SVP evaluations.” (Rodriguez letter, p. 2).

This is an interesting statement considering that the Protocol contains detailed mandatory instructions in every facet of the clinical evaluation; and, both editions (2004 p. 32, ¶ 1) (2007, p. 35, ¶ 1) require a mandated outcome:

“Since the person has been committed as an SVP by the court for ‘appropriate treatment’ (Welf. & Inst. Code § 6604), the department believes that a person must finish the program, including the completion of a period of outpatient supervision. Only under rather unusual circumstances would a patient being evaluated for SVP commitment extension be deemed unlikely to commit future sexually violent acts as a result of a mental disorder, if all five phases of treatment have not been completed. If this is the case, the evaluator is required to consult with the department on their conclusion.”

This provision in the Protocol mandates a professional psychological conclusion, while at the same time, Mr. Rodriguez claims the DMH does not have the “authority to dictate,” how the clinicians exercise professional judgement in conducting SVP evaluations, and that “it is not appropriate or practicable” for DMH to “promulgate regulations regarding” such matters. This is yet another instance where the State of California cannot have it both ways.

Mr. Rodriguez makes repeated reference to what could be described as the evolving science and standards of the psychological profession, as making it not practical to promulgate a manual such as the Protocol into a regulation. Yet, as shown by just a few of the examples, as quoted above in Section 3 of this petition, nothing has changed between the 2004 and the 2007 editions in the categories cited as prohibiting the DMH from promulgating the Protocol as a regulation. The only substantive changes are contained in the first few pages, where new references to the 1996 legislation known as SB 1128, and the Initiative known as Jessica's Law, are incorporated, and those changes occurred after three years of no changes.

A true and correct copy of the  
**January 17, 2006, letter from John Rodriguez,**  
**Deputy Director, DMH,**  
 is attached hereto as EXHIBIT B.

In a professional paper attacking the Protocol was prepared for presentation at the 22nd Annual Symposium of the American College of Forensic Psychology by Dr. Robert L. Halon, Ph.D. The DMH's Clinical Evaluator Handbook, as the Protocol is often called in professional circles, was the subject of Section 6. (Section 6, pp. 6A through 6N, ***The California Department of Mental Health "Clinical Evaluator Handbook": Pointing the Way to the Demise of Psychology***, is in attached hereto as EXHIBIT C.).

[It should be noted that all of Dr. Halon's references are to the 2004 edition.]

Dr. Halon begins with the statement, "The '*Clinical Evaluator Handbook*' (Handbook) authored and published by the Department of Mental Health, significantly misrepresents the mental health issues and concepts created by Welfare & Institutions Code Section 6600 et seq."

Throughout the 14 pages of this paper, Dr. Raton describes the mandates of the Protocol using terms such as: "misrepresents"; "pseudoscientific jargon, in lieu of scientifically valid," Section II is entitled "SLEIGHT OF MIND"; "the fallacious analytic process used by evaluators who adhere to those *Handbook* instructions"; "clouds the fact"; Section IV is entitled "EXPOSING THE SHELL GAME."

"From the DSM-IV-TR, the very nosology the Handbook instructs its evaluators to use, comes categorical statements in its introduction that fly directly in the face of the Handbook instructions and interpretations," (Halon, p.6E.) [The DSM-IV-TR, published by the American Psychiatric Association, the diagnostic and

statistical manual of mental disorders, is the manual used by all mental health professionals practicing in the United States.]

The *Clinical Evaluator Handbook* states at p. 8, "The role of the clinical evaluator is that of fact finder."

In regards to this sentence Dr. Halon states, "This short sentence is made up of two fallacious propositions: SVP evaluations are not *clinical* in nature, and mental health professionals acting as 'expert' witnesses are *never* 'fact finders'." (Halon, p. 6K.)

"From the DSM-IV-TR, the very nosology the Handbook instructs its evaluators to use in making a diagnosis of the statutorily-defined 'diagnosed mental disorder', comes categorical statements in its introduction that fly directly in the face of the Handbook instructions and interpretations," (Halon, p.6K.)

The *Clinical Evaluator Handbook* states at p. 10, "The evaluator needs to consider each of the three major *clinical* questions and offer clear and unambiguous opinions regarding these WIC 6600 criteria."

Dr. Halon addresses this statement as follows:

"The first question asked by the statute (i.e., whether the respondent has experienced the requisite prior convictions) is **not** *clinical*, psychiatric, psychological, medical, or scientific in nature, and cannot be answered with 'expert' information from any of those disciplines. Legal database and legal arguments are everything needed to answer the question of priors."

"The second question posed by the statute to mental health professionals (i.e., the definition of the 'diagnosed mental disorder') is also not 'clinical' in nature, but is *forensic*. As described above, *Handbook* instructions concerning how to answer the second question are actually *impossible* to follow (i.e., use the diagnostic categories in the Diagnostic and Statistical Manual of Mental Disorders — Fourth Edition—Text Revision . . .)."

"The third question, how *likely* the respondent is to commit sexually violent predatory crimes, is actually not even a legitimate third question; i.e., in the statutorily-defined 'diagnosed mental disorder' that is made up of both the 'predisposition' to commit such crimes and 'impaired volition' in reference to acting on that predisposition, and *makes* a person commit such crimes . . ."

"Even if there were a legitimate third question, the methods the DMH Handbook instructs evaluators to use in making what they call their 'risk assessments' (a blatant euphemism for 'predictions' that everyone agrees cannot be



reliably made) of future dangerousness are invalid. Actually they are nothing more than guesswork couched in pseudo-scientific jargon. Following *Handbook* instructions on how to *predict* respondents' likely dangerousness violates scientific objectivity and is a breach of professional psychological ethics." (Halon, p. 6J.)

The *Clinical Evaluator Handbook* states at p. 10, "Clearly state definitive opinions with a yes or NO answer to each clinical question are required."

Dr. Halon states, "'**Definitive opinions**' is an oxymoron. The accuracy of professional mental health opinions is *probabilistic*. Mental health professionals acting as mental health 'expert' witnesses cannot validly nor ethically provide 'yes' or 'no' answers to the legal questions posed by statute, nor can they legitimately 'predict' what a person will do in the future." (Halon, p. 6J.)

### CONCLUSION

Clearly, both those who may receive a life-time commitment following psychological evaluations performed pursuant to *The Clinical Evaluator Handbook and Standardized Assessment Protocol*, and members of the psychological profession believe the Protocol meets neither the mandate of the SVPA nor professional and ethical standards of the psychological and psychiatric communities.

"Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny. [Citation.] [132 P.3d 255] (*Tidewater, supra*, 14 Cal.4th at pp. 568-569, 59 Cal.Rptr.2d 186, 927 P.2d 296)." (*Morning Star Co. v. State Bd. Of Equalization* (2006), 38 Cal. 4th 324, 333, 42 Cal.Rptr.3d 47, 53.)

The DMH, part of the Executive Branch, lacks Constitutional authority to enact legislation. The Legislature has granted state agencies and departments quasi-legislative powers through the APA providing they follow specific promulgation procedures. However, until and unless the DMH does follow the provisions of the APA to properly promulgate *The Clinical Evaluator Handbook and Standardized Assessment Protocol*, it is an underground regulation which has been implemented in violation of the Separation of Powers Clause, Article III, Section 3, of the California Constitution.

To allow the DMH to continue to utilize such a controversial handbook, such as the Protocol, would be to allow the sort of unfettered power in the Executive Branch that is a step toward a totalitarian concentration of power in the executive; a power to be exercised with inadequate legislative standard, and capable of avoiding judicial review such as this has been prohibited from

the earliest times. See *Hayburn's Case*, (1792) 2 U.S. (Dall.) 408, 1 L.Ed. 436, and its progeny.

Based on the foregoing, it is clear that there is a need for public participation in the regulatory process which directs the attention of agency policymakers to the public they serve, and to ensure that those persons or entities whom a regulation will affect have a voice in its creation.

### 8. Certifications:

I certify that I have submitted a copy of this petition and all attachments to:

Stephen W. Mayberg, Ph.D., Director  
California Department of Mental Health  
1600 9th St., Suite 151  
Sacramento, CA 95814  
(916) 654-2413 / (916) 654-2309

I certify that all the above information is true and correct to the best of my knowledge.

/s/

MICHAEL GEORGE ST. MARTIN  
PETITIONER

January 23, 2008  
Date

### OFFICE OF ADMINISTRATIVE LAW

### ACCEPTANCE OF PETITION TO REVIEW ALLEGED UNDERGROUND REGULATIONS

(Pursuant to title 1, section 270, of the  
California Code of Regulations)

### STATE LANDS COMMISSION

#### Agency being challenged:

The Office of Administrative Law has accepted the following petition for consideration. Please send your comments to:

Richard Smith, Staff Counsel  
Office of Administrative Law  
300 Capitol Mall, Ste. 1250  
Sacramento, CA 95814

A copy of your comment must also be sent to the petitioner and the agency contact person.

Petitioner:

Thomas and Nancy Bollay  
P.O. Box 5686  
Santa Barbara, CA 93150



Agency contact:

Paul D. Thayer, Executive Officer  
State Lands Commission  
100 Howe Avenue, Suite 100-S  
Sacramento, CA 95825-8202

Please note the following timelines

Publication of Petition in Notice Register: April 25, 2008

Deadline for Public Comments: May 27, 2008

Deadline for Agency Response: June 9, 2008

Deadline for Petitioner Rebuttal: No later than 15 days after receipt of the agency's response

Deadline for OAL Decision: August 25, 2008

The attachments are not being printed for practical reasons or space considerations. However, if you would like to view the attachments please contact Margaret Molina at (916) 324-6044 or [mmolina@oal.ca.gov](mailto:mmolina@oal.ca.gov).

# **PETITION FOR DETERMINATION OF UNDERGROUND REGULATION ADOPTED BY THE STATE LANDS COMMISSION**

## **Introduction**

The California State Lands Commission ("Commission"), a state agency, issued, used, enforced, or attempted to use or enforce an underground regulation. Petitioners, Thomas and Nancy Bollay ("Petitioners"), interested persons as defined in 1 California Code of Regulations ("CCR") § 250, respectfully demand that, pursuant to Government Code § 11340.5 and Title 1 CCR § 260, the Office of Administrative Law ("OAL") review this Petition for Determination Of Underground Regulation Adopted By the State Lands Commission and provide its required determination.

In connection with its management and administration of tidelands<sup>1</sup> along California's Pacific Ocean coast, the Commission implemented the following "policy:" the Commission first purports to locate and fix a "most landward location of the mean high tide line" as the landward<sup>2</sup> extent of tidelands. Next, in connection with land use approvals for development on ocean beach upland property immediately adjoining tidelands, the Commission objects to any development waterward of that fixed, most landward location of the mean high tide line (collectively "Most Landward

Boundary Policy"). The Most Landward Boundary Policy is a regulation that has not been adopted pursuant to Chapter 3.5 of Division 3, Part 1 of the Government Code. The Most Landward Boundary Policy impacts property rights of ocean beach upland property along the entirety of California's Pacific Ocean oceanfront. Consequently, the Petition raises issues of considerable public importance.

Pursuant to Government Code Section 11340.5, Petitioners request OAL's prompt determination that the Most Landward Boundary Policy is an illegal underground regulation that may not be enforced, utilized or attempted to be enforced or utilized unless and until it has been adopted pursuant to the APA.

## **1. Identifying Information:**

Thomas & Nancy Bollay  
P.O. Box 5686  
Santa Barbara, CA 03150

Counsel for Petitioners:  
Bruce S. Flushman, Esq.  
Wendy L. Manley, Esq.  
Wendel Rosen Black & Dean, LLP  
1111 Broadway, 24<sup>th</sup> Floor  
Oakland, CA 94607.  
(510) 834-6600

## **2. State Agency Issuing Underground Regulations:**

State Lands Commission

## **3. Background**

### 3.1 Relation of Coastal Properties

Petitioners and others own undeveloped ocean beach upland property fronting on or encompassing portions of a Pacific Ocean beach in Santa Barbara County, California ("Property").<sup>3</sup> Petitioners' ownership extends oceanward to the OHWM; the Property's OHWM shoreline is approximately 400 feet long. Adjoining the Property, along its oceanward frontage, is State of California's tideland.

### 3.2 Property Boundary<sup>4</sup> of Ocean Beach Uplands and Adjoining State Lands

Along California's ocean coast, the property boundary between ocean beach uplands and tidelands owned by the State of California is the Ordinary High Water Mark ("OHWM") as it exists from day to day. (E.g., Civ. Code §§ 670, 830; *California, ex rel. State Lands Comm'n v. United States*, 457 U.S. 273 (1982); *Lechuzza Villas West v. California Coastal Comm'n*, 60 Cal.App.4<sup>th</sup> 218, 235 (1997).) The OHWM is a legal term; along much of California's Pacific Ocean coast,

<sup>3</sup> Petitioners' ocean beach upland Property is described in Exhibit 1, attached hereto and incorporated by reference

<sup>4</sup> The property boundary determines the extent of rights and control stemming from land ownership. (E.g., Civ. Code § 829; *Sigourney v. American Psychoanalytic Association*, 93 Cal.App.4<sup>th</sup> 593, 603 (2001).

<sup>1</sup> Tidelands are lands lying waterward of the Ordinary High Water Mark ("OHWM"). E.g., *Shively v. Bowlby*, 152 U.S. 1, 26 (1894); *Borax, Ltd v. Los Angeles*, 296 U.S. 10, 15 (1935). Coastal ocean beach property situated landward of tideland is referred to herein as "ocean beach upland."

<sup>2</sup> We use the terms "landward" and "oceanward" or "waterward" to describe the orientation of a feature or property with respect to the ocean.

the OHWM is not a readily identifiable or permanent physical location, but rather shifts with change in the profile of the shoreline. (*Lechuza Villas*, at 235.)

The Commission asserts a computed line, denominated by the Commission as the Mean High Tide Line (“MHTL”) is the physical location of the OHWM. The computed MHTL consists of two essential elements: the ocean (or water) level computed at mean high water,<sup>5</sup> and the shoreline topography or profile at the time of the survey.<sup>6</sup> The Commission contends this computed line is the physical location of the landward boundary of tidelands and the oceanward boundary of ocean beach. No case, however, establishes this computed location as a fixed, physical indicia or location of the OHWM property boundary between tidelands and ocean beach uplands along California’s Pacific Ocean coast. (See, e.g., *Lechuza Villas*, at 235.)<sup>7</sup>

Location of the boundary between these contiguous ownerships has significant consequences. Tidelands owned by the State of California are held in trust for the benefit of the public for purposes of commerce, navigation and fishery (“Public Trust”). (Civ. Code, § 670; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521, cert. den. sub nom. *Santa Fe Land Improve. Co. v. Berkeley* (1980) 449 U.S. 840.; *State of Cal. ex rel. State Lands Com. v. Superior Court* (1995) 11 Cal.4th 50, 63.) Pursuant to the Public Resources Code Section 6301, the Commission is the state agency charged with administration of State tidelands. Ocean beach uplands landward of the OHWM are largely, and specifically in the case of the Property, privately owned, not subject to the Public Trust or to the jurisdiction of the Commission. (Civ. Code, § 830; *State of Cal. ex rel. State Lands Com. v. Superior Court*, supra, 11 Cal.4th at p. 63.) Thus, both the authority of the Commission and the property rights of owners of ocean beach uplands such as Petitioners are impacted by location of this boundary.

### 3.3 Utilization of Underground Regulation

In May, 1999, Petitioners applied to the County for a permit<sup>8</sup> to construct a vacation cottage on the Property. The area of the Property for development permit purposes (as well as that of other similarly situated ocean beach upland parcels) depends on the location of the OHWM. As the landward (or back) property boundary of the Property is fixed, location of the OHWM (or ocean front) boundary determines the width and, consequently, the area of these parcels.

After Petitioners filed their development application, the County asked the Commission to determine the OHWM boundary of tidelands with respect to the Property. Stated another way, the Commission was asked to determine the oceanward boundary of the Property. Without any specifics, the Commission told the County the Property probably encroached on tidelands. The Commission suggested if Petitioners wanted a more specific determination of the location of the OHWM boundary of the Property and tidelands, the Commission would perform such a determination, but only at Petitioners’ expense.<sup>9</sup>

As a result, the County refused to process Petitioners’ development permit application contending the Commission’s determination essentially eliminated Petitioners ownership and ability to develop the Property.<sup>10</sup> At their own expense, Petitioners prepared and submitted to the Commission a study by a licensed surveyor (“Petitioners’ Boundary Study”).<sup>11</sup> Using both historic and current evidence, Petitioners’ Boundary Study located the Property’s oceanward boundary substantially waterward from the Commission’s informal location. In other words, Petitioners’ Boundary Study disputed the Commission’s informal location of the boundary between tidelands and Petitioners’ ocean beach uplands and established the Property was about 125 feet wide and qualified for development.

The Commission rejected the Petitioners’ Boundary Study. Instead, the Commission reiterated the Property

<sup>5</sup> Mean high water is the mathematically calculated average height of the high waters (tides) for the entire 18.6 year lunar cycle at a particular location. Mean high water may be thought of as a horizontal plane or tidal datum. Unlike the shifting profile of the dynamic ocean beach shoreline, a tidal datum is mathematically precise and unchanging.

<sup>6</sup> Please see the attached Appendix A for a graphic illustration of the MHTL in profile and in vertical section.

<sup>7</sup> The *Lechuza* opinion notes no authority is cited for “the proposition that reference on a . . . map to the mean high tide as surveyed on a particular date in and of itself establishes such otherwise undefined line as the legal boundary thenceforth, regardless of how the mean high tide or shoreline’s profile may vary over the years.” (*Lechuza*, at 240.)

<sup>8</sup> The County issues land use approvals, including coastal development permits, authorizing development along the County’s coastline, including the Property. (Santa Barbara County Coastal Zoning Ordinance, Art. II of Ch. 35; California Coastal Act, Gov. Code §§ 30000, et seq.)

<sup>9</sup> A copy of a letter dated December 10, 1999, from Paul Thayer, Executive Officer of the Commission, to the County of Santa Barbara is attached hereto as Exhibit 2.

<sup>10</sup> A copy of a letter dated July 21, 2000 from Kimberly McCarthy (County) to Steve Amerkaner (Petitioners’ counsel) is attached hereto as Exhibit 3. Petitioners disputed this conclusion. See letter dated June 4, 2001 from Hatch & Parent (Petitioners’ counsel) to the County attached hereto as Exhibit 4.

<sup>11</sup> A copy of a letter dated May 28, 2003 from Paul Como (Petitioners’ surveyor) to Paul Thayer, Executive officer of the Commission, is attached hereto as Exhibit 5.

was sometimes oceanward of the Commission's informal location of the MHTL and if Petitioners wanted an investigation by the Commission of the OHWM boundary of the Property and contiguous tidelands, Petitioners must bear the expense.<sup>12</sup>

A year later, the County received a grant that enabled it to fund a contract with the Commission to "determine the extent of the ordinary high water mark at [certain] parcels located [in the County and including the Property]" and to prepare a "boundary study" for those parcels.<sup>13</sup> The purpose of the contract with the Commission was to enable the County to "evaluate land use issues, boundaries and the potential future acquisition of the [Property and adjacent ocean beach upland parcels (collectively "Ocean Beach Upland Study Parcels")."<sup>14</sup> In fulfillment of the contract, the Commission submitted to County the "Santa Claus Land Mean High Tideline Study" ("Commission's MHTL Study").<sup>15</sup>

#### 4. Description of the Agency Action

The Commission MHTL Study utilized and enforced the Most Landward Boundary Policy to the Ocean Beach Upland Study Parcels, including the Property.

The Commission's MHTL Study utilizes a fixed MHTL as the physical indicia of the OHWM boundary between tidelands and ocean beach uplands. The Commission's MHTL Study states that since the "known historical range of the mean high tide line in the Study Area extends nearly to the landward boundary of the . . . [Ocean Beach Upland Study Parcels] . . . , it seems unlikely that any of these parcels [including the Property] could be developed in a manner . . . that conformed to the . . . Commission's policy that new development be sited landward of the most landward location of the mean high tide line." (MHTL Study, p. 1.) Applying the Most Landward Boundary Policy, the Commission states it will object to development on the Ocean Beach Upland Study Parcels, including the Property. (MHTL Study, p. 29.) In other words, the Commission's policy locates the most landward location of the MHTL, adopts that location to fix the greatest extent of potential state ownership, and then objects to any development oceanward of that fixed MHTL location.

<sup>12</sup> A copy of a letter dated June 24, 2003 from Paul Thayer, Executive officer of the Commission to Paul Como (Petitioners' surveyor) is attached hereto as Exhibit 6.

<sup>13</sup> A copy of the contract between the County and the Commission dated December 7, 2004 is attached hereto as Exhibit 7.

<sup>14</sup> A copy of a letter dated June 3, 2004 from Rosie Dystie (County) to Kelly Olin (Chief Boundary Determination Officer of the Commission), is attached hereto as Exhibit 8.

<sup>15</sup> A copy of the Commissions' MHTL Study is attached hereto as Exhibit 9.

#### 5. Most Landward Boundary Policy Is An Underground Regulation.

##### 5.1. Requirements for Promulgation of Regulations.

The California Administrative Procedure ("APA") establishes the "basic minimum procedural requirements for the adoption of administrative regulations." (Gov. Code § 11346). The APA holds no state agency shall "issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600" unless that action has been adopted as a regulation under the APA. (Gov. Code § 11340.5; *Morning Star Co. v. State Board of Equalization*, (2006) 38 Cal.4th 324, 332.) Either on its own initiative or in response to a petition from an interested party, the OAL determines if the agency's action is a regulation that has not been properly adopted pursuant to the APA. (Gov. Code § 11340 et seq.)

OAL regulations define "underground regulation" as any:

guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

1 CCR §250(a).

Government Code Section 11342.600 defines a "regulation" as:

every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

The Most Landward Boundary Policy constitutes a regulation within the definition of Government Code Section 11342.600.

##### 5.2. The Most Landward Location of the MHTL Policy is a Regulation

###### 5.2.1 Characteristics of Regulations

A regulation subject to the APA has two principal identifying characteristics:

First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. (*Roth v.*



*Department of veterans Affairs* (1980) 110 Cal. App. 3d 622, 630 . . . .) Second, the rule must “implement, interpret, or make specific the law enforced or administrated by [the agency], or . . . govern [the agency’s] procedure.” (Gov. Code, § 11342, subd. (g).)

(*Tidewater Maine Western Inc., v. Victoria Bradshaw*, 14 Cal. 4th 557, 571 (1996). *See also, Morning Star Co. v. State Board of Equalization*, 38 Cal.4th 324, 333–334 (2006).)

As explained below, the Commission’s Most Landward Boundary Policy constitutes a regulation.

#### 5.2.2 Semantics

The Commission characterizes its Most Landward Boundary Policy as a “policy” or a “practice”<sup>16</sup> and not specifically as a regulation. The Commissions’ characterization is not determinative. That is an agency “policy” that looks, reads or acts like a regulation, will be treated like a regulation, regardless of how the agency labels it. (*SWRCB v. OAL* (1993) 12 Cal. App 4th 697.)

#### 5.2.3 The Most Landward Boundary Policy is Generally Applied.

The Most Landward Boundary Policy is subject to the APA if it is generally applied, as evidenced by its application to an “open class.”<sup>17</sup> (*Roth v. Department of Veterans Affairs*, (1980) 110 Cal. App. 3d 622, 167 Cal Rptr 552.) The Commission admits it has applied the Most Landward Boundary Policy to a broad class of ocean beach uplands for more than 40 years. (MHTL Study p. 29) “[T]he State typically interposes an objection to development in these transitory [fluctuating] beach areas.” (*Id.*)

Thus, the Commission declares a routine practice of enforcing or utilizing the Most Landward Boundary Policy and its intent to continue applying the Policy to development on ocean shoreline uplands. (*Id.*) In other words, the Most Landward Boundary Policy was not created to resolve a matter specific to the Property or even the Ocean Beach Upland Study Parcels; the Most Landward Boundary Policy guides the agency in connection with all ocean beach uplands throughout the State. (MHTL Study p. 29.) Consequently, the Most Landward Location of the MHTL Policy meets the first prong of the *Tidewater* test.

#### 5.2.4 Most Landward Boundary Policy is an Interpretation of the Commissions’ Authority.

##### 5.2.4.1 Commission Authority

The Commission administers and controls all tidelands including leasing of tidelands, ejecting trespass-

ers, granting certain privileges, and protecting the public trust. Pub. Res. Code § 6301. As part of the administration of tidelands, the Commission is authorized to establish the OHWM boundary between tidelands and upland property, including ocean beach uplands, by “agreement, arbitration, or action or quiet title . . . .” Pub. Res. Code § 6357. Other statutes, such as Public Resources Code Sections 6202<sup>18</sup> and 6332,<sup>19</sup> authorize the Commission to conduct surveys without specifying explicit authority to the Commission to establish the MHTL as the physical location of the boundary of tidelands or ocean beach uplands. Importantly, the boundary of tidelands and the Ocean Beach Study Parcels may not be established by Commission survey, except as the result of an agreement with the ocean beach upland property to owner.<sup>20</sup>

#### 5.2.4.2 The Most Landward Boundary Policy Interprets, etc. the Authority of the Commission.

The Most Landward Boundary Policy meets the second prong of the *Tidewater* test. A guideline, memo or other document or policy is a regulation if it goes beyond merely restating the law, and “implement[s], interpret[s], or makes specific the law enforced or administered by the agency, or governs the agency’s procedure.” (Govt. Code § 11342.600.) The Most Landward Boundary Policy goes well beyond merely restating the law.

As noted above, the Commission’s sole authority is to establish the ordinary high water mark.<sup>21</sup> The Commission’s authority to conduct a boundary survey allows the Commission to “. . . establish[ ] and survey[ ] the line of ordinary high water . . . .” (Pub. Res. Code § 6332(a)(6).) The Commissions’ use of the MHTL as a surveyed, fixed physical indicia of the OHWM in order to establish the extent of its authority is the Commission’s attempt to interpret the authority provided under both Public Resources Code §§ 6301 and 6332. The Commission’s particular application of the MHTL at its most landward extent is not the only possible method of

<sup>18</sup> Public Resources Code § 6202 authorizes the Commission to “make surveys and subdivisions of lands belonging to the state to be sold, leased, or to have the boundary established.”

<sup>19</sup> Public Resources Code § 6332 authorizes the Commission to survey the boundary of ungranted tidelands. Ungranted tidelands are those tidelands that have not been granted by the State to municipalities. The tidelands oceanward of the Ocean Beach Upland Study Parcels are ungranted tidelands.

<sup>20</sup> Public Resources code § 6339(b) specifically provides that, unless the owner of the ocean beach upland property agrees, any “boundary” located by the Commission is not binding on any person whose rights may be affected.

<sup>21</sup> The Commission’s website contains the following statement: “The location and extent of sovereign lands are generally defined by reference to the ordinary high and low water marks of tidal and navigable waterways.”

<sup>16</sup> MHTL Study g. 29.

<sup>17</sup> An open class is one whose members can change.



establishing the property boundary between tidelands and ocean beach uplands. (*Lechuza Villas*, at 239.) Consequently, the Commission's policy is not the only possible interpretation of the law.

In addition, Public Resources Code §§ 6336 and 6357 establish that the only boundary the Commission is permitted to establish vis a vis ocean beach uplands is the OHWM and then only by agreement, arbitration, or action or quiet title. Placement of the MHTL relative to ocean beach uplands at a particular location (the most landward location) is an effort to implement and interpret the Commission's authority. As the Commission's policy is not used in the context of an agreement, arbitration or an action to quiet title, it is manifestly not a restatement of this statutory authority.<sup>22</sup>

Finally, although the Commission is authorized to manage State tidelands and conduct boundary surveys,<sup>23</sup> the Commission's policy is to object to land uses on contiguous lands. Nowhere in law is the Commission granted authority over private lands. Consequently, the policy is not a restatement of authority granted to the Commission. Rather, the Commission's use of the policy to delineate State tidelands is an effort to interpret and implement its authority to manage State tidelands.

#### 5.2.5 Conclusion

Thus, the Most Landward Boundary Policy meets both prongs of the *Tidewater* test as a "standard of general application" adopted to attempt to "implement, interpret, or make specific the law enforced or administered, or to govern its procedure." (Govt. Code § 11342.600.) In sum, the Commission's Most Landward Location of the MHWL Policy constitutes a regulation subject to the APA.

#### 5.3 No Statutory APA Exemption

Petitioner is unaware of any exemption, statutory or implied, that would permit Commission to adopt and implement the Most Landward Boundary Policy without compliance with the APA.

#### 5.4 The Commission's Most Landward Boundary Policy was not adopted under the APA

The Commission did not follow the APA in adopting or implementing its Most Landward Boundary Policy. The APA establishes the procedures by which state agencies may adopt regulations. The agency must

1. give the public notice of its proposed regulatory action (Gov. Code, § 11346.4, 11346.5);
2. issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code, § 11346.2, subds. (a), (b));
3. give interested parties an opportunity to comment on the proposed regulation (Gov. Code, § 11346.8);
4. respond in writing to public comments (Gov. Code, § 11346.8, subd. (a), 11346.9); and
5. forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code, § 11347.3, subd. (b)).

*Tidewater* at p. 568.

The Commission did not:

1. give public notice of its policy;
2. issue a complete text of the regulation with a statement of reasons;
3. give interested parties an opportunity to comment on the proposed regulation;
4. respond in writing to public comments, and
5. forward a file of all materials on which the Commission relied to OAL.

In fact, there is no written "policy."<sup>24</sup>

Consequently, the Commission has not followed any of the procedures mandated by the APA for adoption a regulation.

#### 6. The Public Importance of the Petition

Application or enforcement of the Commission's Most Landward Boundary Policy is significant to thousands of ocean shoreline uplands owners. The Commission utilizes the Policy as a regulation, and local governments and state agencies rely on and defer to Commission's determinations and recommendations based on its "policy." In this case, the County refused to process Petitioners' development application based on Commission's application of its "policy." Other state agencies such as the California Coastal Commission restate the Commission's practice. (Regional Cumulative Assessment Project (1999) CA Coastal Comm'n., p. 75.)

As utilization of the Commission's Most Landward Boundary Policy affects individual property rights along the State's entire Pacific Ocean coast, formal adoption of the Commission's policy in conformance with APA procedures is essential.

<sup>22</sup> The Commission's contract with the County obligated the Commission to study the OHWM. The Commission clarified its obligation by specifying that its study was to determine the most landward location of the boundary of state sovereign lands. A copy of a letter dated August 4, 2004 from Mary Hayes (Commission) to Rosie Dyste (County), is attached hereto as Exhibit 10. Thus, the Commission interprets the extent of its authority,

<sup>23</sup> See text accompanying notes 18 and 19 above.

<sup>24</sup> A policy need not be committed to writing to be an invalid underground regulation. See, *Morning Star Co. v. State Board of Equalization*, (2006) 38 Cal.4th 324, 336.

**7. Certification of Petition Submitted to the State Lands Commission**

I, the undersigned, Thomas Bollay, certify that I have submitted a copy of this Petition and all its attachments to:

Mr. Paul Thayer  
Executive Officer  
State Lands Commission  
100 Howe Avenue, Suite 100 South  
Sacramento, California 95825-8202  
Phone number: (916) 574-1800

Courtesy copy to:

Attorney General Edmund G. Brown Jr., Attention:  
Tara L. Mueller  
County of Santa Barbara, Attention: County Counsel

All of the above information is true and correct to the best of my knowledge.

Government Code Section 11349.3

OAL File No. 2008-0204-04S

**DECISION SUMMARY**

The Acupuncture Board ("Board") proposed to amend the California Code of Regulations, Title 16, relating to the Board's continuing education ("CE") requirements for acupuncturists. This regulatory action makes extensive revisions to the CE provider approval process, CE course approval process, and listing of approved CE course topics and to that end adopts a one page form entitled "Continuing Education Provider Application Form (Rev. 12/06)", adopts a seven page form entitled "Request for Continuing Education (CE) Course Approval Form (Rev. 12/06)", and amends another one page form entitled "Active/Inactive License Application (Rev. 12/06)."

Date: March 26, 2008

**DISAPPROVAL DECISIONS**

**DECISIONS OF DISAPPROVAL OF REGULATORY ACTIONS**

Printed below are the summaries of Office of Administrative Law disapproval decisions. Disapproval decisions are available at [www.oal.ca.gov](http://www.oal.ca.gov). You may also request a copy of a decision by contacting the Office of Administrative Law, 300 Capitol Mall, Suite 1250, Sacramento, CA 95814-4339, (916) 323-6225 — FAX (916) 323-6826. Please request by OAL file number.

**ACUPUNCTURE BOARD**

State of California  
Office of Administrative Law

In re:

Acupuncture Board

Regulatory Action:

Title 16, California Code of Regulations

Adopt sections:

Amend sections: 1399.480, 1399.481, 1399.482,  
1399.483, 1399.484, 1399.485,  
1399.486, 1399.487, 1399.488,  
1399.489, 1399.489.1

Repeal sections:

**DECISION OF DISAPPROVAL OF REGULATORY ACTION**

Gordon R. Young  
Senior Staff Counsel

For: Susan Lapsley  
Director

Original: Janelle Wedge, Executive Officer

Copy: Mary Howard

**DEPARTMENT OF HEALTH CARE SERVICES**

**STATE OF CALIFORNIA  
OFFICE OF ADMINISTRATIVE LAW**

In re:

DEPARTMENT OF  
HEALTH CARE SERVICES

REGULATORY ACTION:

Title 22, California Code of Regulations

Amend sections: 51098.5, 51202.5,  
51309.5 and 51503.3

Decision of Disapproval  
of Regulatory Action

(Gov. Code, sec. 11349.3)

OAL File No. 2008-0226-04 S

**DECISION SUMMARY**

The Department of Health Care Services (Department) proposed to amend the California Code of Regulations, Title 22, sections 51098.5, 51202.5, 51309.5

and 51503.3 relating to Medi-Cal reimbursements for sign language interpreter services. This proposed regulatory action would have amended the definition of "sign language interpreter services," required a Medi-Cal enrolled provider to select another interpreter if the interpreter selected by the beneficiary is determined to be inadequate, expanded the scope of health care services for which Medi-Cal will reimburse enrolled providers for using sign language interpreter services, and provided that Medi-Cal will reimburse for sign language interpreter services for Medi-Cal enrolled providers, not just physicians, that employ fewer than 15 employees.

Date: April 10, 2008

DEBRA M. CORNEZ  
Assistant Chief Counsel

For: SUSAN LAPSLEY  
Director

Original: Sandra Shewry  
Copy: Shelly Osuna  
Dept. of Finance

**SUMMARY OF REGULATORY  
ACTIONS**

**REGULATIONS FILED WITH  
SECRETARY OF STATE**

This Summary of Regulatory Actions lists regulations filed with the Secretary of State on the dates indicated. Copies of the regulations may be obtained by contacting the agency or from the Secretary of State, Archives, 1020 O Street, Sacramento, CA 95814, (916) 653-7715. Please have the agency name and the date filed (see below) when making a request.

File# 2008-0219-06  
**AIR RESOURCES BOARD**  
Oceangoing Incineration

This change without regulatory effect reflects the updated version of Chart 18740, San Diego to Santa Rosa Island, which is incorporated by reference into section 93119(c)(9), for purposes of showing the location of the Three Nautical Mile Line on the National Oceanic and Atmospheric Administration (NOAA) Nautical Chart authored by the NOAA Office of Coast Survey. The revised nautical chart reflects several changes, such as,

relocated buoys and changed jetty lights, but there is no change to the Three Nautical Mile Line.

Title 17  
California Code of Regulations  
AMEND: 93119  
Filed 04/02/2008  
Agency Contact: Trini Balcazar (916) 445-9564

File# 2008-0307-04  
**AIR RESOURCES BOARD**  
Portable Engine and Equipment Registration

The Air Resources Board (ARB) is changing renumbering which took place in File No. 2007-0731-06C. In the definition sections ARB changed the numbering hierarchy from alpha to numeric in an effort to try to format all of ARB's regulations in the same manner. ARB decided it would be easier to change the definition section back to alpha format due to several cross-references contained within their regulations.

Title 13  
California Code of Regulations  
AMEND: 2451, 2452, 2453, 2458, 2461  
Filed 04/07/2008  
Effective 04/07/2008  
Agency Contact: Amy Whiting (916) 322-2990

File# 2008-0226-05  
**CALIFORNIA HORSE RACING BOARD**  
Paymaster of Purses

In this regulatory action, the California Horse Racing Board amends its regulation pertaining to duties of the "Paymaster of Purses" at a racing association. The amendments provide that the paymaster of purses shall deduct from a horse owner's account .3 percent of the net purse earned by any thoroughbred horse at a thoroughbred racing association or Fair meeting and deposit it into the California Retirement Management Account (CARMA), a charitable trust fund maintained by the horsemen's organization representing thoroughbred horse owners for distribution to California thoroughbred retirement/rehabilitation facilities, which provide livestock care and services to retired thoroughbred horses that competed in thoroughbred races in California. Thoroughbred horse owners may elect not to have the .3 percent deduction by filing a specified form with the paymaster of purses.

Title 4  
California Code of Regulations  
AMEND: 1467  
Filed 04/08/2008  
Effective 05/08/2008  
Agency Contact: Harold Coburn (916) 263-6397

File# 2008-0222-03

**DEPARTMENT OF CORRECTIONS AND REHABILITATION****Visiting Searches**

The California Department of Corrections and Rehabilitation (CDCR) proposes to amend section 3173.2 of the California Code of Regulations (CCR), Title 15, concerning visiting searches. Specifically, CDCR seeks to adopt a reasonable suspicion standard for conducting clothed searches of visitors.

**Title 15**

California Code of Regulations

AMEND: 3173.2

Filed 04/07/2008

Effective 05/07/2008

Agency Contact: Kelly Medina (916) 341-7390

File# 2008-0222-02

**DEPARTMENT OF FISH AND GAME****Vacuum or Suction Dredging**

This action deletes language in Title 14 of the CCR, section 228(b)(1) that allows the Department to issue a special permit to suction dredge during a closed season or in a closed water. This action is based on 1 CCR 100(a)(3) and the entry of a final judgment in *Eason v. California Department of Fish and Game, et. al.*, Sacramento County Superior Court Case No. 06CS00768. The 60-day appeal period expired on December 24, 2007 so that this is now a final judgment.

**Title 14**

California Code of Regulations

AMEND: 228(b)(1)

Filed 04/07/2008

Agency Contact: Stephen Puccini (916) 653-6590

File# 2008-0403-02

**DEPARTMENT OF FOOD AND AGRICULTURE****Light Brown Apple Moth Interior Quarantine**

This regulatory amendment will expand the quarantine area of Marin County with respect to the light brown apple moth (LBAM; *Epiphyas postvittana*) due to new detections.

**Title 3**

California Code of Regulations

AMEND: 3434(b)

Filed 04/08/2008

Agency Contact: Stephen Brown (916) 654-1017

File# 2008-0321-02

**DEPARTMENT OF FOOD AND AGRICULTURE****Diaprepes Root Weevil Interior Quarantine**

This is the Certificate of Compliance for six emergency rulemakings (OAL file numbers: 07-1220-02 E;

07-1212-02 E; 07-1121-04 E; 07-1119-02 E; 07-1026-05 E and 07-1002-03 E) with respect to the interior quarantine of the Diaprepes Root Weevil (DRW). The emergency rulemakings concern various parts of San Diego and Los Angeles counties.

**Title 3**

California Code of Regulations

AMEND: 3433(b)

Filed 04/02/2008

Agency Contact: Stephen Brown (916) 654-1017

File# 2008-0324-01

**DEPARTMENT OF FOOD AND AGRICULTURE****Diaprepes Root Weevil Interior Quarantine**

This emergency regulatory action will expand the existing quarantine area in the Rancho Santa Fe area of San Diego County by approximately two square miles for the Diaprepes root weevil (*Diaprepes abbreviatus*).

**Title 3**

California Code of Regulations

AMEND: 3433(b)

Filed 04/02/2008

Effective 04/02/2008

Agency Contact: Stephen Brown (916) 654-1017

File# 2008-0219-03

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT****Joe Serna Jr. Farmworker Housing Grant Program**

This regulatory action makes extensive changes to completely update the regulations for this program in order to implement the revisions made by five legislative actions since 2000. This action includes a reorganization of subchapter 3 of chapter 7, division 1, title 25 into four new articles.

**Title 25**

California Code of Regulations

ADOPT: 7201, 7205, 7205.1, 7205.2, 7205.3, 7206, 7207, 7209, 7211, 7215, 7225, 7231 AMEND: 7200, 7202, 7204, 7206 (renumbered to 7209.5), 7208, 7210, 7212, 7218 (renumbered to 7217), 7220, 7222, 7224, 7226, 7228, 7230, 7232, 7234, 7239 (renumbered to 7201) REPEAL: 7214, 7216

Filed 04/02/2008

Effective 05/02/2008

Agency Contact: Lenora Frazier (916) 323-4475

File# 2008-0325-02

**DEPARTMENT OF PUBLIC HEALTH****Newborn Screening Fee Increase**

On September 9, 2007, the Department of Public Health directly filed an emergency regulation, increasing the fees in the newborn screening program, with the Secretary of State, and then submitted the regulation to



the Office of Administrative Law for printing purposes only in the California Code of Regulations pursuant to Health and Safety Code section 124977, subdivision (d). Health and Safety Code section 124977, subdivision (d)(1) provides that the regulation shall become effective immediately upon filing with the Secretary of State; however, the regulation "shall be subject to public hearing within 120 days of filing with the Secretary of State and shall comply with Sections 11346.8 and 11346.9 of the Government Code or shall be repealed." This filing contains the Department's Statement of Compliance that it complied with the requirements of section 124977, subdivision (d)(1) of the Health and Safety Code.

Title 17  
California Code of Regulations  
AMEND: 6508  
Filed 04/03/2008  
Agency Contact:  
Barbara S. Gallaway (916) 657-3197

File# 2008-0222-01  
DIVISION OF WORKERS COMPENSATION  
Workers' Compensation

This is a nonsubstantive action reorganizing and renumbering sections to accommodate new procedural regulations adopted by the court administrator concerning electronic filing of workers' compensation claims. The renumbering will also place together related return-to-work regulations.

Title 8  
California Code of Regulations  
AMEND: 10116, 10116.1, 10117.1, 10118.1, 10119, 10120, 10121, 10136, 10137, 10225, 10225.1, 10225.2  
Filed 04/07/2008  
Effective 04/07/2008  
Agency Contact: Destie Overpeck (510) 286-7100

File# 2008-0314-03  
FAIR POLITICAL PRACTICES COMMISSION  
Audits of CalPERS Candidate Committees

This action concerns the Fair Political Practices Commission's audits of candidates for an election to the Board of Administration to the Public Employees' Retirement System.

Title 2  
California Code of Regulations  
AMEND: 18997  
Filed 04/09/2008  
Effective 05/09/2008  
Agency Contact:  
Virginia Latteri-Lopez (916) 324-3854

File# 2008-0328-02  
FISH AND GAME COMMISSION  
Ocean Salmon Sport Fishing

The Fish and Game Commission is amending the Ocean Salmon Sport Fishing season regulation. The ocean Salmon sport fishing season will be closed until the new season is determined at the next Commission meeting.

Title 14  
California Code of Regulations  
AMEND: 27.80  
Filed 04/04/2008  
Effective 04/04/2008  
Agency Contact: Sherrie Koell (916) 654-9866

### **CCR CHANGES FILED WITH THE SECRETARY OF STATE WITHIN NOVEMBER 7, 2007 TO APRIL 9, 2008**

All regulatory actions filed by OAL during this period are listed below by California Code of Regulations titles, then by date filed with the Secretary of State, with the Manual of Policies and Procedures changes adopted by the Department of Social Services listed last. For further information on a particular file, contact the person listed in the Summary of Regulatory Actions section of the Notice Register published on the first Friday more than nine days after the date filed.

#### **Title 1**

02/25/08 ADOPT: 48, 50, 52 AMEND: 55  
01/29/08 AMEND: 1, 6, 90, and Appendix A (Std. Form 400)

#### **Title 2**

04/09/08 AMEND: 18997  
03/28/08 ADOPT: 59630  
03/24/08 AMEND: 18735  
03/19/08 AMEND: 55300  
03/19/08 AMEND: 549.90  
03/19/08 AMEND: 18200  
03/03/08 AMEND: 1859.76, 1859.83, 1859.104.3  
02/25/08 AMEND: 549.80  
02/25/08 AMEND: 714  
01/07/08 AMEND: 1859.2, 1859.43, 1859.50, 1859.51, 1859.81, 1859.106  
01/07/08 AMEND: 18531.61  
01/03/08 ADOPT: 547.69, 547.70, 547.71  
AMEND: 547.69 renumbered as 547.72, 547.70 renumbered as 547.74, 547.71 renumbered as 547.73  
12/26/07 AMEND: div. 8, ch. 54, sec. 54300  
12/19/07 ADOPT: 18413  
12/18/07 ADOPT: 1859.324.1, 1859.330  
AMEND: 1859.302, 1859.318,

	1859.320,	1859.321,	1859.322,	(Renumbered to 649.54),	656.3		
	1859.323,	1859.323.1,	1859.323.2,	(Renumbered to 649.55),	656.4		
	1859.324,	1859.326,	1859.328,	1859.329	(Renumbered to 649.53), 656.5		
12/17/07	AMEND:	58700		(Renumbered to 649.56),	656.6		
12/17/07	AMEND:	18351		(Renumbered to 649.50),	656.7		
12/13/07	ADOPT:	18531.2		(Renumbered to 649.58),	656.8		
12/13/07	AMEND:	18530.4		(Renumbered to 649.57),	657.1		
12/13/07	AMEND:	18421.2		(Renumbered to 649.59),	657.2		
12/06/07	AMEND:	649,	649.1 (Renumbered to 649.15), 649.1.1 (Renumbered to 649.16), 649.2 (Renumbered to 649.12), 649.3 (Renumbered to 649.24), 649.7 (Renumbered to 649.35), 649.8 (Renumbered to 649.36), 649.9 (Renumbered to 649.7), 649.10 (Renumbered to 649.22), 649.11 (Renumbered to 649.8), 649.12 (Renumbered to 649.9), 649.13 (Renumbered to 649.23), 649.14 (Renumbered to 649.27), 649.15 (Renumbered to 649.11), 649.16 (Renumbered to 649.30), 649.17 (Renumbered to 649.31), 649.18 (Renumbered to 649.26), 649.20, 649.21, 649.22 (Renumbered to 649.10), 649.71 (Renumbered to 649.25), 649.72 (Renumbered to 649.4), 650.1 (Renumbered to 649.6), 651.1 (Renumbered to 649.1), 651.2 (Renumbered to 649.14), 651.3 (Renumbered to 649.13), 651.4 (Renumbered to 649.34), 651.5 (Renumbered to 649.5), 652.1 (Renumbered to 649.39), 652.2 (Renumbered to 649.40), 653.1 (Renumbered to 649.42), 653.2 (Renumbered to 649.2), 653.3 (Renumbered to 649.41), 653.4 (Renumbered to 649.37), 653.5 (Renumbered to 649.38), 653.6 (Renumbered to 649.61), 654.1 (Renumbered to 649.3), 654.2 (Renumbered to 649.43), 654.3 (Renumbered to 649.46), 654.4 (Renumbered to 649.44), 654.5 (Renumbered to 649.45), 654.6 (Renumbered to 649.47), 655.1 (Renumbered to 649.51), 656.1 (Renumbered to 649.52), 656.2			(Renumbered to 649.60), 657.3	(Renumbered to 649.62)
<b>Title 3</b>							
	04/08/08	AMEND:	3434(b)				
	04/02/08	AMEND:	3433(b)				
	04/02/08	AMEND:	3433(b)				
	04/01/08	ADOPT:	821, 821.1, 821.2, 821.3, 821.4, 821.5 REPEAL: 784, 784.1, 784.2, 800, 800.1, 801, 802				
	03/26/08	AMEND:	3434(b)				
	03/21/08	AMEND:	3434(b)				
	03/19/08	AMEND:	6620				
	03/17/08	AMEND:	3434(b)				
	03/17/08	AMEND:	3406(b)				
	03/17/08	AMEND:	3700(c)				
	03/13/08	AMEND:	6860				
	03/12/08	AMEND:	3434(b)				
	03/12/08	AMEND:	3406(b)				
	03/05/08	AMEND:	3875				
	03/04/08	AMEND:	3867				
	03/03/08	AMEND:	3591.20				
	02/22/08	AMEND:	3434(b)				
	02/21/08	AMEND:	6393				
	02/11/08	AMEND:	3434(b)				
	02/08/08	AMEND:	3591.20				
	02/04/08	AMEND:	3434(b)				
	01/29/08	AMEND:	3700(c)				
	01/28/08	AMEND:	3433(b)				
	01/28/08	AMEND:	4500				
	01/25/08	ADOPT:	6445, 6445.5, 6448, 6448.1, 6449, 6449.1, 6450, 6450.1, 6450.2, 6451, 6451.1, 6452, 6452.1, 6452.2, 6452.3(a), 6452.3(b), 6452.3(c), 6452.3(d), 6452.3(e), 6452.3(f), 6452.4, 6536(a), 6536(b)(1–3), 6536(b)(4)				
		AMEND:	6000, 6400, 6450, 6450.1, 6450.2, 6450.3, 6452, 6453, 6502, 6624, 6626, 6784				
	01/24/08	AMEND:	1391, 1391.1				
	01/22/08	AMEND:	3591.6				
	01/22/08	AMEND:	3591.6				
	01/22/08	AMEND:	3591.2(a)				
	01/22/08	AMEND:	3591.5(a)				
	01/18/08	AMEND:	3423(b)				

01/18/08	ADOPT: 3152		1207.5, 1209, 1210, 1211, 1211.5, 1215,
01/11/08	AMEND: 3406(b)		1215.5, 1216, 1217, 1218, 1219, 1225
01/10/08	AMEND: 3433(b)	11/19/07	ADOPT: 11981.3, 11984.5, 11984.6,
01/07/08	AMEND: 1180.3.1		11985, 11985.5, 11985.6 AMEND:
12/26/07	AMEND: 3433(b)		11981 (renumber to 11980), 11982
12/26/07	AMEND: 3963		(renumber to 11981), 11985 (renumber
12/21/07	AMEND: 3434(b)		11981.5), 11980 (renumber to 11982),
12/20/07	ADOPT: 606		11986 (renumber to 11982.5), 11983,
12/19/07	AMEND: 3700(c)		11983.5, 11984
12/19/07	AMEND: 3433(b)	<b>Title 8</b>	
12/10/07	AMEND: 3406(b)	04/07/08	AMEND: 10116, 10116.1, 10117.1,
12/06/07	AMEND: 3589		10118.1, 10119, 10120, 10121, 10136,
12/03/07	AMEND: 3434(b)		10137, 10225, 10225.1, 10225.2
11/29/07	AMEND: 3434(b)	04/01/08	ADOPT: 3140, 3141, 3141.1, 3141.2,
11/29/07	AMEND: 3591.2		3141.3, 3141.4, 3141.5, 3141.6, 3141.7,
11/27/07	AMEND: 3406(b)		3141.8, 3141.9, 3141.10, 3141.11,
11/27/07	AMEND: 3433(b)		3141.12, 3141.13, 3142, 3142.1, 3142.2,
11/21/07	AMEND: 3433(b)		3143, 3144, 3145, 3146 AMEND: 3000,
11/16/07	AMEND: 3417(b)		3001, 3009, 3094.2, 3120.6, 3137
11/15/07	AMEND: 3434	03/05/08	AMEND: 1504, 1597
11/14/07	AMEND: 3589	03/05/08	AMEND: 3228
11/14/07	AMEND: 3591.20	02/29/08	AMEND: 3270
11/09/07	AMEND: 3434(b)	12/31/07	AMEND: 3650
		12/28/07	AMEND: 1604.24
		12/11/07	ADOPT: 9767.16, 9813.1, 9813.2
			AMEND: 9767.1, 9810, 9811, 9812,
			9813
<b>Title 4</b>		12/10/07	ADOPT: 13800
04/08/08	AMEND: 1467	12/04/07	AMEND: 3214, Figure E-1 of 3231,
03/24/08	AMEND: 10177, 10178, 10181, 10182,		Plate B-17
	10187, 10188, 10189	11/29/07	ADOPT: 33485 AMEND: 32135, 32166,
02/29/08	ADOPT: 8102, 8102.1, 8102.2, 8102.3,		32500, 32630, 32700, 32781, 32784,
	8102.4, 8102.5, 8102.6, 8102.7, 8102.8,		32786, 33480, 61020, 61450, 61470,
	8102.9, 8102.10, 8102.11, 8102.12,		61480, 81020, 81450, 81470, 81480,
	8102.13, 8102.14, 8102.15 AMEND:		91020, 91450, 91470, 91480
	8090, 8091, 8092, 8093, 8094, 8095,	11/26/07	ADOPT: 392.4 AMEND: 347, 350.1,
	8096, 8097, 8098, 8099, 8100, 8101		355, 359, 359.1, 371.2, 374, 385, 392.5
01/22/08	AMEND: 8070, 8072, 8073		
01/10/08	AMEND: 1632	<b>Title 9</b>	
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12/06/07	AMEND: 9100	12/05/07	ADOPT: 2166, 2166.1, 2167, 2168, 2169, 2170, 2171, 2172, 2172.1, 2172.2, 2172.3, 2172.4, 2172.5, 2172.6, 2172.7, 2172.8, 2172.9, 2173, 2174 AMEND: 1956.8, 1958, 1961, 1976, 1978, 2111, 2122, 2136, 2141, Incorporated Test Procedures
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03/20/08	AMEND: 1950.314.8	<b>Title 14</b>	
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12/19/07	AMEND: 2698.82(b), 2698.84, 2698.87, 2698.89.1	02/19/08	AMEND: 7.50
11/30/07	AMEND: 2699.6611	02/13/08	ADOPT: 704
11/30/07	ADOPT: 2699.6603, 2699.6604 AMEND: 2699.6603 (renumbered to 2699.6602), 2699.6605, 2699.6607, 2699.6608, 2699.6611, 2699.6625	02/11/08	ADOPT: 787.0, 787.1, 787.2, 787.3, 787.4, 787.5, 787.6, 787.7, 787.8, 787.9
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12/26/07	ADOPT: 2990, 2995, 2997 AMEND: 2125, 2518	02/19/08	AMEND: 1887.2, 1887.3
12/26/07	AMEND: 2.00	02/15/08	AMEND: 30, 95, 95.2, 95.6
12/17/07	AMEND: 17210.2, 17210.4, 17855.2, 17862, 17867	02/04/08	AMEND: 2751
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11/29/07	ADOPT: 916.9.1, 936.9.1, 916.9.2, 936.9.2, 916.11.1, 936.11.1, 923.9.1, 943.9.1, 923.9.2, 943.9.2 AMEND: 859.1, 916.9, 936.9, 956.9, 923.9, 943.9, 963.9	12/27/07	AMEND: 1833.1, 1870
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 5091 (amend and renumber to 5601),  
 5092 (amend and renumber to 5602),  
 5093 (amend and renumber to 5603),  
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02/06/08 AMEND: 2708(c)–1  
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 15187.1, 15190, 15200, 15210, 15220,  
 15230, 15240, 15241, 15250, 15260,  
 15280, 15290, 15300, 15310, 15330,  
 15400.2, 15600  
 02/25/08 ADOPT: 21815 AMEND: 21780, 21790,  
 21800, 21820, 21825, 21830, 21840,  
 21865, 22234, 22240, 22243, 22244,  
 22246, 22247, 22248, 22249, 22249.5,

	22251, 22252, 22253, Division	<b>Title MPP</b>
	2 — Appendix 3	11/28/07
12/18/07	AMEND: 15290 (reports 3, 4 & 6), 15400.1, Division 3 — Subdivision 1 — Chapters 1, 2, 3, 4, 5, 6	AMEND: 47–110, 47–260, 47–301, 47–430, 47–601, 47–602, 47–620, 47–630 REPEAL: 47–610
<b>Title 28</b>		
01/10/08	AMEND: 1300.67.60	